

THE RELIGIOUS BROADCASTING FREEDOM ACT AND THE NONCOMMERCIAL BROADCASTING FREEDOM OF EXPRESSION ACT OF 2000

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE, AND CONSUMER PROTECTION
OF THE

COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

H.R. 3535—THE RELIGIOUS BROADCASTING FREEDOM ACT
H.R. 4201—THE NONCOMMERCIAL BROADCASTING FREEDOM OF
EXPRESSION ACT OF 2000

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**HEARING ON H.R. 3535, THE RELIGIOUS
BROADCASTING FREEDOM ACT AND H.R.
4201, THE NONCOMMERCIAL BROAD-
CASTING FREEDOM OF EXPRESSION ACT
OF 2000**

THURSDAY, APRIL 13, 2000

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 1:08 p.m., in room 2322, Rayburn House Office Building, Hon. W.J. "Billy" Tauzin (chairman) presiding.

Members present: Representatives Tauzin, Gillmor, Pickering, Stearns, Oxley, Shimkus, and Markey.

Staff present: Linda Bloss-Baum, majority counsel; Cliff Riccio, legislative analyst; and Andy Levin, minority counsel.

Mr. TAUZIN. The committee will please come to order.

Welcome and good afternoon.

Early this year, the FCC sought to quantify the service obligations of noncommercial television licenses by requiring that "More than half of the hours of programming aired on a reserved channel must serve an educational, instructional or cultural purpose in the station's community of license." The Commission further determined that while programming which "teaches about religion" would count toward the new benchmark, programs "devoted to religious exhortation, proselytizing, or statements of personally held religious views and beliefs would not qualify."

In drawing substantive distinctions between varying religious messages, the FCC clearly attempted to impose content-based programming requirements on noncommercial, religious television broadcasters without considering the implications such requirements had on broadcaster rights under the First Amendment and the Religious Freedom Restoration Act. Moreover, the FCC tried to directly discriminate against religious broadcasters without ever conducting notice or comment.

In the wake of these actions, the FCC was inundated with stern opposition to the "Additional Guidance portion" of its WQED Pittsburgh Memorandum, Opinion and Order. This opposition came from noncommercial licensees, from listeners, viewers and religious groups and from the Hill in waves. I, myself, sent a list of 33 questions to Chairman Kennard asking him to explain full detail the

basis for the Commission's decision. Just as I suspected, the Commission declined to respond to the interrogatories. In addition, Congressman Oxley dropped a bill to negate the legal effect of the WQED Pittsburgh Order which is one of the two bills up for consideration here today.

Fortunately, in response to our collective public outcry over its actions, the FCC wisely decided to vacate the Additional Guidance portion of its order by a vote of 4 to 1. For that, I do commend the Commission. However, I feel there is still some cause for concern.

Despite the 4 to 1 reversal of its order, it is clear that some Commissioners still contend that the Additional Guidance portion of the Order represents sound policy that offends neither the First Amendment, the Religious Freedom Restoration Act, nor traditional American values. Commissioner Tristani has even asserted that she, "for one, will continue to cast her vote in accordance with the views expressed in the Additional Guidance." This gives me the eerie feeling that if we, in Congress, don't legislate in this area as soon as possible, FCC will once again attempt to impose onerous and unreasonable eligibility standards upon those entities seeking to receive and maintain noncommercial educational broadcast licenses. Once again, I fear these standards will have the net effect of directly discriminating against religious content.

Today, we are here to discuss the proper legislative course of action to deal with the situation. Before us are two bills, H.R. 3201, the Noncommercial Broadcasting Freedom of Expression Act, introduced by Mr. Pickering last week and H.R. 3525, the Religious Broadcasting Freedom Act, the bill I alluded to earlier that was introduced by Mr. Oxley shortly after the FCC issued its WQED Pittsburgh Order. Both of these are good bills and clearly we would be better off than we are today if either one were enacted into law.

At this juncture, I feel the approach taken by H.R. 3525, while very noble in concept, needs some strengthening. In addition to directing the FCC to vacate the WQED Pittsburgh Order, which it has already done, H.R. 3525 enables the FCC to set eligibility standards, content-based programming requirements and content neutral programming requirements subject to only one limitation, that the Commission must set these standards and requirements through a rulemaking proceeding based on notice and comment.

While it is true the FCC offended us all when it tried to circumvent the notice and comment requirements of the APA, I don't believe that we solve our ultimate problem simply by requiring the FCC to go through a rulemaking every time they decide to legislate on the content requirements of noncommercial broadcasters.

Just because a rulemaking proceeding may produce a record that we all like does not mean we can trust the FCC the objectively abide by that record. To the contrary, in the age of the administrative state, the FCC has become rather infamous, I think, in shunning an administrative record and imposing its own policy agenda when it chooses to do so.

We are, on the floor today, dealing with an FM radio bill that is a good example of that where the Commission moved through a rule to do something which this committee feels very strongly was heading in a very bad direction.

Later today, I will be managing the bill also introduced by Mr. Oxley on the floor to deal exactly with that. As we rightfully acknowledged before the Rules Committee yesterday, the bill that we have on the floor today seeks to rectify the situation whereby the Commission created a new low-powered FM radio license in complete disregard of the administrative record containing clear evidence that the creation of these new licenses would result in unacceptable levels of interference for existing FM stations.

In light of this LPFM predicament, I must ask why should we expect the FCC to respect the record that might renounce the FCC's proposed definition of cultural, instructional and educational program or its proposed eligibility standards for receiving and holding a noncommercial license. The short answer is that we shouldn't and we can't afford to.

Rulemakings these days only slow down the FCC just a bit. Even when charged with notice, content and comment responsibilities, the FCC always seems to find a way to impose its will, whether or not that is the will of Congress to whom the FCC is supposed to be legislatively answerable.

I think enough is enough. Now the FCC has shown us the blueprint of how it would prefer to treat noncommercial, religious programming, we simply need a bill that does more than subject that blueprint to notice and comment. Mr. Pickering's bill, H.R. 4201, which he has introduced on behalf of Mr. Oxley, myself, Mr. Largent, Mr. Stearns, I believe today Mr. Armey and Mr. DeLay have signed on as co-sponsors, takes an appropriately stronger stance against the FCC and against what they tried to do earlier this year.

Under H.R. 4201, an entity is eligible for a noncommercial license where the station is primarily used to broadcast material that the entity reasonably determines serves an educational, instructional or cultural purpose. Unless such determinations are arbitrary or unreasonable, the FCC must defer to the editorial programming judgment of the entity by affording actual licensees some discretion to determine what type of programming bears a reasonable or rational relationship to educational, instructional or cultural.

The bill imposes a single, clear, non-onerous eligibility requirement on noncommercial broadcasters. Moreover, the FCC in paragraph 3 of its Memorandum, Opinion and Order, which vacates the Additional Guidance of the WQED Order, fully admits that this type of discretion affording eligibility standard is in fact the most prudent type of eligibility standard the Commission should be enforcing.

I quote from paragraph 3 of the Order, "In hindsight, we see the difficulty of making clear definitional parameters for 'educational instruction or cultural programming.' Therefore, we vacate our Additional Guidance. We will defer to the editorial judgment of the licensees unless such judgment is arbitrary or unreasonable." In accordance with this conclusion, H.R. 4201 prudently seeks to codify this standard so that something more onerous cannot be proposed later on down the road. The Commission, pursuant to its own regulations, has been deferring to the reasonable judgment of non-

commercial broadcasters for years. Now is not the time to change that policy.

In addition, H.R. 4201 prevents the FCC from imposing the same content-based programming requirements upon noncommercial programming that we saw in the WQED Order. Specifically, the FCC cannot require that a majority or 50.1 percent of noncommercial entity programming must serve an educational, instructional or cultural purpose in order for that entity to receive and hold a non-commercial broadcast license.

In addition, the FCC, under the bill, cannot prevent religious programming from being determined by a licensee to serve an educational, instructional or cultural purpose. Nor can the Commission, in this bill, impose any other requirements on the content of noncommercial programming that are not currently imposed upon commercially broadcast programming.

Finally, H.R. 4201 protects both the noncommercial television and radio license and licensees whereas the protections provided by H.R. 3525 extend only to television licensees. The new bill covers not only the television but radio licensees of religious programming.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. MICHAEL G. OXLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

As we all know, in an FCC order released December 29, 1999 involving what should have been a routine television license transfer, the FCC provided "additional guidance" to noncommercial licensees stating that, henceforth, "religious exhortation, proselytizing, or statements of personally-held religious views and beliefs generally would not qualify as 'general educational' programming."

The order also quantified the educational mandate of noncommercial licensees to require them to devote at least 50 percent of their air time to educational programming—so the decision not to count traditional religious content towards that 50 percent mandate had serious implications for religious broadcasters. Broadcasters who did not supplant a sufficient amount of their religious programming with FCC-approved content would run the risk of losing their licenses.

Within days, on January 6th, Congressmen Pickering, Largent, Stearns, and I sent a letter to Chairman Kennard objecting to the Commission's action. As we said in that letter, "the Commission has no business—no business whatsoever—singling out religious programming for special scrutiny." We went on to say, "we advise you to reverse this ruling, or stand by and see it overturned legislatively or in court."

The response we received from Chairman Kennard on January 12 stated that "the Commission's decision in this case... does not establish new rules, but simply clarifies long-standing FCC policy." We immediately wrote back informing Chairman Kennard that we had drafted legislation to nullify the Commission's action. H.R. 3525, the Religious Broadcasting Freedom Act, was introduced on January 24th with 60 original cosponsors. Four days later, the Commission withdrew its additional guidance. Today, H.R. 3525 enjoys the support of 125 bipartisan cosponsors.

While those of us sitting at this dias might like to take full credit for the Commission's reversal, the truth is there was a much more powerful force at work. That, of course, was the thousands of people of faith, acting out of religious conviction, who flooded the Commission and Congress with phone calls, letters, and personal testimony in support of religious freedom and religious broadcasting. It was a modern-day David and Goliath story.

However, it is my strong opinion that the FCC *Order on Reconsideration* does not put the matter to rest. The Commission majority has never acknowledged its errors—substantive or procedural—in issuing the original directive. Rather, they attribute the uproar over the order to "confusion" over its meaning. Given Chairman Kennard's claims that the directive was merely a clarification of previous agency policy, the decision to vacate it does not resolve the underlying problem with the Commission's interpretation of the law.

That being the case, I was pleased to work with the gentleman from Mississippi to build on H.R. 3525, a process which resulted in the introduction of H.R. 4201.

This new bill spells out in even clearer terms that the Commission cannot discriminate against religious broadcasters and religious content. I commend the gentleman, Mr. Pickering, for his hard work on this issue—from day one to the present—and I thank the Chairman for calling today's legislative hearing on both measures.

Mr. Chairman, it is clear to me that the FCC needs to have congressional intent with respect to religious broadcasting spelled out in much clearer terms. God works in mysterious ways, but almost certainly not through the FCC.

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Thank you Mr. Chairman and thank you for calling this hearing to discuss the significant threat of content regulation of our nation's airwaves.

For nearly half a century non-commercial educational television channels have been allocated by the FCC to better serve the local needs of communities across the country. Under this well established system, religious broadcasters that wish to become certified as a non-commercial broadcaster have been required to show that their programming was "primarily educational."

But last December, when Congress was out of session and the public was focused on the holiday season, the FCC issued a troublesome decision about what programming may qualify for these non-commercial licenses. This decision raised warning flags on both substance and process.

First on process. Not only was this decision released in the so called "dark of night," it was contained as an "additional guidance" section to a license transfer decision—and therefore not subject to public review and comment. In my opinion, any attempts to impose content-based programming requirements on any broadcaster must receive the benefits of a public rulemaking proceeding, in order to fully consider the monumental impacts on broadcasters and on the public.

Secondly on substance. The Commission attempted to impose content based requirements on noncommercial educational stations, by requiring that more than half of the programming hours on a reserved channel be devoted to serve the educational needs of the community. The Commission specifically singled out religious programming for new rules by stating explicitly that church services would not qualify as educational programming.

The FCC should not be in the business of quantifying program requirements for noncommercial stations. Under current standards, the FCC may only assess the reasonableness of a broadcaster's judgment regarding the educational needs of its community. Let me be clear—the FCC may go no further to review content.

I am pleased to see that both pieces of legislation that we consider today address these fundamental issues regarding the FCC's authority to act both substantively and procedurally. I would like to commend the sponsors of the two bills, Mr. Oxley and Mr. Pickering, for their hard work and for taking the quick action necessary to keep the Commission in check. I look forward to hearing the views of our panel this morning, and with that I yield back the balance of my time.

PREPARED STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman: As a cosponsor of H.R. 3525, I was very concerned last December when the Federal Communications Commission (FCC) issued their "additional guidance" to the WQED-Pittsburgh broadcast license application. The FCC decision attempting to clarify what is and is not educational programming with respect to religious broadcasting was very disturbing.

By not following normal rulemaking procedures the FCC prohibited my constituents from being heard on this issue. Government and God do not mix. When a federal entity decides it wants to involve itself with religious matters there will be a reaction from Congress. Unfortunately, that is why we are here today.

I believe Mr. Oxley's legislation is a balanced approach that restores the status-quo to content requirements for non-commercial educational television broadcasters. I appreciate the FCC acknowledging their mistake and promptly rescinded their additional guidance section.

I am very interested in hearing from both Commissioners on any future action they may be considering regarding this issue and whether they believe their additional guidance was a new policy directive or simply clarification of previous policy that had been implemented in the past.

I do not want to completely prohibit the FCC for exercising some limited oversight of the noncommercial educational channels if we can receive some assurances that what happened in Pittsburgh was an attempt to implement new policy. If the Com-

mission believes that they were simply expanding on existing authority allowing them to classify educational content, then Mr. Pickering's legislation which we will be considering next may have some merit.

I do have some concerns with Mr. Pickering's legislation. By preventing the FCC from exercising any regulatory authority over what may or may not qualify as educational content are we creating a loophole that could allow very alternative religious programming to be licensed under the guise of being educational, instructional, or cultural. While the panel members here today represent what I consider the main stream religions. What happens if someone applies for a non-commercial educational television license to promote their beliefs in some very alternative religion. What role does the FCC then play in reviewing these types of applications.

This may be an extreme example, but I would appreciate any insights panel members may have on a situation like this occurring.

In conclusion Mr. Chairman, I want to thank you for conducting this important hearing and I look forward to hearing what the panelists have to add on these issues.

Mr. TAUZIN. With all that having been said, let me make one thing very clear. At the end of the day, whichever legislative language is adopted by the subcommittee, we ought to do it right. For the numerous reasons I have cited today, we cannot allow the Commission to have another bite at this apple when it comes to protecting the freedom on noncommercial speech in religious broadcasting.

The Chair welcomes our panel. I am pleased today to welcome as our witnesses, the Honorable Harold W. Furchtgott-Roth; the Honorable Gloria Tristani; Mark Dreistadt, Vice President, Administration and Finance, Cornerstone Television; Mr. Don Wildmon, President, American Family Association; and Mr. E. Brandt Gustavson, President, National Religious Broadcasters.

We will begin with the Honorable Harold W. Furchtgott-Roth of the Commission.

STATEMENTS OF HON. HAROLD W. FURCHTGOTT-ROTH, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; HON. GLORIA TRISTANI, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; MARK DREISTADT, VICE PRESIDENT, ADMINISTRATION AND FINANCE, CORNERSTONE TELEVISION; E. BRANDT GUSTAVSON, PRESIDENT, NATIONAL RELIGIOUS BROADCASTERS; AND DON WILDMON, PRESIDENT, AMERICAN FAMILY ASSOCIATION

Mr. FURCHTGOTT-ROTH. Mr. Chairman, as always, it is a great honor and privilege to be here.

I would like to have my testimony submitted for the record.

Mr. TAUZIN. Without objection, the written statements of all the witnesses, as well as any members who wish to submit written statements, will be admitted into the record. It is so ordered.

It is a great honor for me to be here today testifying, along with my colleague, Commissioner Tristani. She and I do occasionally differ on policy issues but I must say that she brings to the Commission the very highest degree of personal integrity. I am very privileged to serve with her.

The issues before us today have to do with free speech and religious freedom. Mr. Chairman, I will abide no abridgement of either of those. The issues before us also hinge very much on constitutional law. I cannot sit here before you today and pretend to be personally an expert in that area.

I am privileged to have on my staff, Ms. Helgi Walker who I think is one of the very brightest lawyers with whom I have ever had the privilege of working. So in my testimony, if you find anything that is accurate and to the point, please recognize that it is Ms. Walker who has placed it there. If I make any mistakes here, those are mine.

Mr. TAUZIN. They are all yours, of course.

Mr. FURCHTGOTT-ROTH. In the manner you described, I dissented vigorously from the Additional Guidance. To my mind, quantification of educational programming obligations of noncommercial licensees was potentially unconstitutional.

In *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court went out of its way in discussing the validity of our regulatory requirements for noncommercial, educational broadcasters to note that our rules did not require broadcasters to air any specific amount of such programming. The clear implication of that discussion is that quantified programming obligations for NCC licensees would indeed raise First Amendment problems.

Worse, the Commission's Additional Guidance raised the specter of discrimination against certain broadcasters on the basis of their religious message. No other noncommercial, educational broadcasters, of course, were subjected to the no exhortation or no statement of personally held views standard announced in that Order.

In *Rosenberger v. University of Virginia*, the Supreme Court made clear that once government opens an avenue for expression, it may not deny access to those with religious, editorial viewpoints simply because of those viewpoints. Conversely and contrary to the insertion of some in the WQED majority, the Court also made clear that allowing such groups to speak on the same basis as others in order to avoid a First Amendment violation does not in turn violate the establishment clause.

Let me quote specifically from the *Rosenberger* case. At 846, the Court held, "There is no establishment clause violation in honoring duties under the Free Speech Clause. The notion that there is an establishment clause violation here is simply wrong."

Federal examination of the question whether a view expressed by an individual is personally held or not is an astonishingly invasive venture. It seems to be an obviously content-based, indeed belief-based, inquiry. In essence, the standard enunciated in the Order meant that if you believe what you are saying about religion, you can't say it on the noncommercial educational band, but if you don't believe what you are saying, then you can.

A personal belief test for designating those who may and may not operate on the reserved band is a clear infringement of core speech rights. It simply is ludicrous.

Commissioner Powell and I stated in our joint dissent "The more the Commission attempts to define which educational, instructional and cultural programming will count for regulatory purposes, the closer it will come to unacceptable and unconstitutional content regulation. The example of church services used in the Order itself illustrates this point.

The order indicated that church services generally would not qualify as general educational programming. We asked, however, why such programming might not qualify as cultural programming,

just as a presentation of an opera might. It would be very hard to broad-brush either type of programming as having no intrinsic cultural value. Moreover, depending upon the nature and content of the service, it might very well be properly educational. Certainly millions of Americans attend church services in part for the educational value of the teachings embodied in the sermon.

On January 28 the Commission hurriedly issued on its own motion an Order vacating the Additional Guidance of the first WQED Decision. I concurred in that vacatur because as I explained, "That guidance was wrong on the merits." I also stated that "As a result of the Commission's express rejection and vacatur of this guidance, there should be no doubt that the Mass Media Bureau is unauthorized to engage in any formal or informal practice of directly reviewing the substance of stations' programming or imposing a quantification requirement on educational programming.

For instance, the Bureau cannot suggest the addition of certain shows or the deletion of others from a programming schedule in order to obtain licensing approval. Instead, the Bureau's task is simply to assess whether the broadcaster's judgment that his station will be used chiefly to serve the educational needs of the relevant community is arbitrary or unreasonable. Anything more in the way of programming content review or programming quantification would be unwarranted, improper and in derogation of the Order on Reconsideration.

Unfortunately, while this understanding of the Bureau's current authority is, in my opinion, the legally correct one, it is unclear whether this understanding prevails at the Commission. Chairman Kennard, in defending the original Order, asserted in essence that "The Commission's decision was simply writing down what was in fact Commission practice." This characterization of the WQED Order is based entirely on past precedent was not rejected in the Order on Reconsideration, nor has it since been refuted.

Of course I strongly disagree with the assertion that the Order established nothing new. If that were true, there would have been no need to write and adopt the Additional Guidance section of the Order. I doubt that the majority would have engaged in this work if it were not, in fact, necessary.

Assuming, however, that one does believe the nothing new characterization would be correct, then the simple vacatur of the WQED Order is insufficient to protect religious broadcasters from the treatment heralded in the Additional Guidance section of that Order. This uncertainty is a lingering problem for religious broadcasters. It should be made clear that the underlying policies and interpretations of past precedent that animated the Additional Guidance that the majority of the Commission adopted themselves is null and void. If this question is left open, the Commission is sure to go a second round on the specifics on when religious stations should be deemed to serve educational ends.

All it would take is for a similar license transfer application to come along, and we receive many such applications, to have a renewed regulatory battle over this issue. I fear that the speech of religious broadcasters operating on the noncommercial educational band will be chilled and when the issue again comes to a head at the Commission, their speech will be directly abridged.

Thank you, Mr. Chairman.
 [The prepared statement of Hon. Harold W. Furchtgott-Roth follows:]

PREPARED STATEMENT OF HON. HAROLD W. FURCHTGOTT-ROTH, COMMISSIONER,
 FEDERAL COMMUNICATIONS COMMISSION

On December 29, 1999, the FCC released a decision approving the application for assignment of license of WQEX(TV) Channel 16, Pittsburgh, PA, from WQED Pittsburgh to Cornerstone TeleVision, Inc., and the application for assignment of license of WPCB-TV, Channel 40, Greensburg, PA, from Cornerstone to Paxson Pittsburgh License, Inc. Cornerstone sought, and was granted, authority to move from Channel 40 to Channel 16, and to sell Channel 40 to Paxson.

I voted to adopt this part of the Commission's decision, which found that Cornerstone—a religious broadcasting entity—met the legal standard for operating on the noncommercial, educational (“NCE”) band. That standard requires that the “station[] . . . be used primarily to serve the educational needs of the community” and “for the advancement of educational programs.”¹ In applying this standard, the Commission deferred, as it traditionally has done, to the good faith judgment of the broadcaster that its station would serve educational purposes.

The Commission did not stop there, however. In a further statement purportedly designed to provide broadcasters with “additional guidance,” the Commission elaborated on the situations in which religious programming would be deemed “primarily educational” for purposes of licensing on the NCE band.

The Commission stated:

First, with respect to the overall weekly program schedule, more than half of the hours of programming aired on a reserved channel must primarily serve an educational, instructional or cultural purpose in the station's community of license. Second, in order to qualify as a program which is educational, instructional or cultural in character, and thus counted in determining compliance with the overall benchmark standard, a program must have as its primary purpose service to the educational, instructional or cultural needs of the community.²

On this second point, the Commission elaborated that:

not all programming, including programming about religious matters, qualifies as “general educational” programming. For example, programming primarily devoted to religious exhortation, proselytizing, or statements of personally-held religious views and beliefs generally would not qualify as “general educational” programming. . . . [T]he reserved television channels are intended “to serve the educational and cultural broadcast needs of the entire community to which they are addressed,” and to be responsive to the overall public as opposed to the sway of particular political, economic, social or religious interests.³

I dissented vigorously from this discussion. To my mind, quantification of the educational programming obligation of noncommercial licensees was potentially unconstitutional. In *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court went out of its way, in discussing the validity of our regulatory requirements for non-commercial educational broadcasters, to note that our rules did *not* require broadcasters to air any specific amount of such programming.⁴ The clear implication of that discussion is that quantified programming obligations for NCE licensees would indeed raise First Amendment problems.

Worse, the Commission's “additional guidance” raised the specter of discrimination against certain broadcasters on the basis of their religious message. No other noncommercial, educational broadcasters, of course, were subject to the “no exhortation” or “no statement of personally-held views” standard announced in the Order. In *Rosenberger v. University of Virginia*, the Supreme Court made clear that once government opens up an avenue for expression, it may not deny access to those with religious editorial viewpoints simply because of those viewpoints.⁵ Conversely—and contrary to the assertion of some in the *WQED* majority—the Court also made clear

¹ 47 C.F.R. section 73.621.

² *WQEX-WQED Order* at para. 43.

³ *Id.* at para. 44.

⁴ See 512 U.S. 622, 651 (1994) (observing that “[w]hat is important for [First Amendment] purposes . . . is that noncommercial licensees are not required by statute or regulation to carry any specific quantity of ‘educational’ programming or any particular ‘educational’ programs”).

⁵ See 515 U.S. 819, 828-837 (1995) (holding that denial of State funding for publications of student groups to those with religious editorial viewpoints is unconstitutional viewpoint discrimination).

that allowing such groups to speak on the same basis as others in order to avoid a First Amendment violation does not, in turn, violate the Establishment Clause.⁶

On top of that, federal examination of the question whether a view expressed by an individual is personally held or not is an astonishingly invasive venture. It seems to be an obviously content-based—indeed, belief-based—inquiry. In essence, the standard enunciated in the Order meant that if you believe what you are saying about religion, you can’t say it on the NCE band, but if you don’t believe what you are saying, then you can. A “personal belief” test for designating those who may and may not operate on the reserved band is a clear infringement of core speech rights.⁷

At bottom, and as Commissioner Powell and I stated in our joint dissent, the more the Commission attempts to generically define which “educational, instructional and cultural” programming will count for regulatory purposes, the closer it will come to unacceptable and unconstitutional content regulation. The example of church services used in the Order illustrates the point. The Order indicated that church services generally would not qualify as “general educational” programming.⁸ We asked however, why such programming might not qualify as “cultural” programming just as a presentation of an opera might? It would be very hard to broad brush either type of programming as having no intrinsic cultural value. Moreover, depending upon the nature and content of the service, it might very well be properly educational. Certainly, millions of Americans attend church services, in part, for the educational value of the teachings embodied in a sermon.

On January 28, 2000, the Commission hurriedly issued on its own motion an Order vacating the “additional guidance” of the first *WQED* decision. I concurred in that vacatur because, as I explained, that guidance was wrong on the merits.

I also stated that, as a result of the Commission’s express rejection and vacatur of this guidance, there should be no doubt that the Mass Media Bureau is unauthorized to engage in any formal or informal practice of directly reviewing the substance of stations’ programming or imposing a quantification requirement on educational programming. For instance, the Bureau can not suggest the addition of certain shows or the deletion of others from a programming schedule in order to obtain licensing approval. Instead, the Bureau’s task is simply to assess whether the broadcaster’s judgment that his station will be used chiefly to serve the educational needs of the relevant community is arbitrary or unreasonable. Anything more in the way of programming content review or programming quantification would be unwarranted, improper, and in derogation of the Order on Reconsideration.

Unfortunately, while this understanding of the Bureau’s current authority is in my opinion the legally correct one, it is unclear whether this understanding prevails at the Commission. Chairman Kennard in defense of the original Order asserted that:

The Commission’s decision in this case therefore does not establish new rules, but simply clarifies long-standing FCC policy applicable to any broadcaster seeking to use an NCE-reserved channel. The decision followed and cited prior Commission decisions in describing what kinds of religious programming would qualify as educational.

Letter from Chairman William E. Kennard to Representatives Oxley, Pickering, Stearns, and Largent, Jan. 20, 2000.⁹ This characterization of the *WQED* Order as based entirely on past precedent was not rejected in the Order on Reconsideration, nor has it since been refuted.

Of course, I strongly disagree with the assertion that the Order established nothing new. If that were true, there would have been no need to write and adopt the “additional guidance” section of the Order. I doubt that the majority would have engaged in this work if it were in fact unnecessary.

Assuming, however, that one *does* believe the “nothing new” characterization to be correct—as the Chairman of the FCC apparently does—then simple vacatur of the *WQED* Order is insufficient to protect religious broadcasters from the treatment heralded in the additional guidance section of that Order.

This uncertainty is a lingering problem for religious broadcasters operating with NCE licenses. It should be made clear that the underlying policies and interpretations of past precedent that animated the “additional guidance” majority at the Commission are themselves null and void. If this question is left open, the Commis-

⁶ See *id.* at 837-846 (holding that funding of religious student publications does not violate the Establishment Clause); *id.* at 846 (stating that “[t]here is no Establishment Clause violation in . . . honoring . . . duties under the Free Speech Clause.”).

⁷ Cf. *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down statute barring NCE stations receiving federal grants from engaging in editorializing).

⁸ *WQEX-WQED* Order at para. 44 n.91.

⁹ See <http://www.fcc.gov/Speeches/Kennard/Statements/2000/stwek003.html>.

sion is sure to go a second round on the specifics of when religious stations should be deemed to serve "educational" ends. All it would take is for a similar license transfer application to come along, and we receive many such applications: a renewed regulatory battle over this issue is likely just a question of time. I fear that, in the meanwhile, the speech of religious broadcasters operating on the NCE band will be chilled and that, when the issue again comes to a head at the Commission, their speech will be directly abridged.

Thank you again for inviting me to appear before you today.

Mr. TAUZIN. Thank you, Commissioner.

Now the Chair is pleased to welcome the Honorable Gloria Tristani, Commissioner, Federal Communications Commission.

The Chair would also like to make note that the committee invited all of the five Commissioners, including the Chairman, to be with us today and the two Commissioners who are here today accepted the invitation.

I also want to point out for the record as I did to my friend yesterday in person, the Chairman of the Commission, we have not seen the Chairman since October. This is the fourth time he was not able to schedule to be with us at a hearing like this. I want to say on the public record that the invitation for him to appear is still. I would very much like to see Chairman Kennard at one of our hearings where we might talk policy with him and would encourage him to accept the next invitation. We will try to work a schedule that does not conflict with his at the next available time.

The Chair is now pleased to welcome the Honorable Gloria Tristani to the hearing.

STATEMENT OF HON. GLORIA TRISTANI

Ms. TRISTANI. Thank you, Mr. Chairman.

I am pleased to be here to testify at your request. As my statement, I will read portions of my dissenting statement regarding the Commission's Order of January 28, 2000 vacating the Additional Guidance.

At bottom, the Additional Guidance provided in last month's decision stood for one simple proposition—not all religious-oriented programming will count toward the educational use requirement on reserved television channels. This is nothing new. For over 20 years, the Commission's precedent has held that while not all religious programs are educational in nature, it is clear that those programs which involve the teaching of matters relating to religion would qualify.

What was new was that the Commission attempted to give some clarity to its precedent in order to assist its licensees and the public, and more importantly, to ensure that the reserved channels are used for their intended purpose.

Then the pressure campaign began. It was alleged that the Commission was barring certain religious programming from the reserved channels. Not true. The Commission simply held that not all religious programming would count toward the primarily educational requirement.

Then it was alleged that the Commission was somehow restricting religious speech or engaging in a prior restraint. Again, not true. The decision only dealt with a small number of television channels set aside for noncommercial educational use. Religious broadcasters are free to broadcast whatever they wish on commer-

cial channels. Indeed, Cornerstone has been broadcasting unimpeded on a commercial television channel in Pittsburgh since 1978. In this case, Cornerstone was seeking a special privilege from the government, the right to broadcast on a channel reserved primarily for public education. The government may only selectively promote certain speech without abridging other types of speech.

Perhaps the most disturbing charge leveled against the Commission is that its decision reflects an anti-religious bias at the agency. I reject and resent this type of attack reminiscent of a witch hunt. It is precisely because of my deep respect for religion and my deep appreciation for the religious diversity of America that I supported our Additional Guidance.

Religion is not merely an educational interest like cooking or computers, that may appeal to only a subset of the population. Religion is much more than that. The freedom to believe and the freedom to believe in nothing at all is one of our most precious freedoms. In order to preserve the freedom, the establishment clause of the First Amendment precludes the government from aiding, endorsing or opposing a particular religious belief or from promoting belief versus nonbelief.

As Justice O'Connor recognized in her concurring statement on *County of Allegheny v. ACLU*, "[T]he endorsement standard recognizes that the religious liberty so precious to the citizens who make up our diverse country is protected, not impeded, when Government avoids endorsing religion or favoring particular beliefs over others." Moreover, Government endorsement of a particular set of religious beliefs sends a powerful message of exclusion to non-adherence.

Again Justice O'Connor concurring in *Lynch v. Donnelly*: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Here, the Government reserves a small number of television channels in a community for educating the public. These channels are quite valuable. Cornerstone planned to move to the non-commercial channel free of charge while selling its commercial channel for \$35 million. Because of their scarcity, the reserved channels are expressly intended to serve the entire community to which they are assigned and to be responsive to the overall public as opposed to the sway of particular political, economic, social or religious interests.

Thus, a prospective licensee cannot operate on a reserved channel unless and until the Government concludes that its programming is primarily educational for the broader public.

In a religiously diverse society, sectarian religious programming, by its very nature, does not serve the "entire community" and it is not "educational" to non-adherents. From a constitutional perspective, a government policy that endorses certain sectarian programming as educational and awards exclusive use of a scarce public resource to permit those views to be expressed would run afoul of the Establishment Clause.

Indeed, programming that promotes adherence to a particular set of religious beliefs "inevitably ha[s] a greater tendency to empha-

size sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does not allow public bodies to foment such disagreement.” County of Allegheny, O’Connor concurring.

It is no answer to say that non-adherents need not watch those channels. That is like saying that the Government can provide direct aid to the religious mission of sectarian schools because non-adherents can enroll elsewhere. Nor is it an answer to say that all religious programming is educational.

First, the scarcity of reserved channels means that as a practical matter, the Government would be aiding and endorsing certain religious beliefs and not others.

Second, the Establishment Clause not only prohibits Government from aiding or endorsing a particular set of religious beliefs, it also prohibits Government from aiding or endorsing religion over non-religion, or vice versa.

The excuse for vacating the Additional Guidance: that our actions “have created less certainty rather than more,” would be laughable were the stakes not so high. The problem was not a lack of clarity, but that we were too clear. We actually tried to give meaning to our rule. What the majority really means is that they prefer a murky and unenforceable rule to a clear and enforceable one. Indeed, if our decision created uncertainty, the answer would be further clarification not to vacate.

The majority insists that it would like to have the benefit of “broad comment.” But where, one may ask, is the Notice of Rulemaking? The seriousness of the majority’s rulemaking argument can be judged by how quickly it begins a proceeding. I doubt that a rulemaking on this subject will ever see the light of day.

In the end, the majority’s decision takes us back to where we were before this case began. Programming on the reserved channels still must be primarily educational. Programming about religion may still qualify as educational but not all religious programming will qualify. The only difference now is that neither licensees nor the public will have the benefit of specific guidance. The majority’s mantra that we will defer to the licensee’s judgment unless the judgment is “arbitrary or unreasonable” simply begs the question—when does a licensee’s judgment cross the line and become arbitrary or unreasonable? The majority provides no clue.

I cannot see how anyone is better off, other than those who oppose any enforceable rules in this area. I, for one, will continue to cast my vote in accordance with the views expressed in the Additional Guidance and in this statement.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Gloria Tristani follows:]

PREPARED STATEMENT OF HON. GLORIA TRISTANI, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

I am pleased to be here to testify, at your request, on the Religious Broadcasting Freedom Act and the Noncommercial Broadcasting Freedom of Expression Act of 2000. As my statement, I am attaching a copy of my dissenting statement regarding the Commission’s Order of January 28, 2000 in *Re: Application of WQED Pittsburgh and Cornerstone Television, Inc.* vacating the “additional guidance.”

January 28, 2000

DISSENTING STATEMENT OF COMMISSIONER GLORIA TRISTANI

Re: Applications of WQED Pittsburgh and Cornerstone Television, Inc.

This is a sad and shameful day for the FCC. In vacating last month's "additional guidance" on its own motion, without even waiting for reconsideration petitions to be filed, this supposedly independent agency has capitulated to an organized campaign of distortion and demagoguery.

At bottom, the additional guidance provided in last month's decision stood for one simple proposition: not all religious-oriented programming will count toward the requirement that reserved television channels be devoted primarily to "educational" use. This is nothing new. For over twenty years, the Commission's precedent has held that "[w]hile not all religious programs are educational in nature, it is clear that those programs which involve the teaching of matters relating to religion would qualify."¹ What was new was that the Commission attempted to give some clarity to its precedent in order to assist its licensees and the public, and, more importantly, to ensure that the reserved channels are used for their intended purpose.²

Then the pressure campaign began. It was alleged that the Commission was barring certain religious programming from the reserved channels. Not true—the Commission simply held that not all religious programming would count toward the "primarily educational" requirement. Then it was alleged that the Commission was somehow restricting religious speech, or engaging in a prior restraint. Again, not true—the decision only dealt with the small number of television channels set aside for noncommercial educational use. Religious broadcasters are free to broadcast whatever they wish on commercial channels. Indeed, Cornerstone has been broadcasting unimpeded on a commercial television channel in Pittsburgh since 1978. In this case, Cornerstone was seeking a special *privilege* from the government—the right to broadcast on a channel reserved primarily for public education. The government may selectively promote certain speech (e.g., public educational speech) without thereby abridging other types of speech (e.g., religious speech).³

Perhaps the most disturbing charge leveled against the Commission is that its decision reflects an "anti-religion bias" at the agency. I reject and resent this type of attack, reminiscent of a witch-hunt. It is precisely because of my deep respect for religion, and my deep appreciation for the religious diversity of America, that I supported our additional guidance. Religion is not merely an educational "interest" like cooking or computers that may appeal to only a subset of the population. Religion is much more than that. The freedom to believe, and the freedom to believe in nothing at all, is one of our most precious freedoms. In order to preserve that freedom, the Establishment Clause of the First Amendment precludes the government from aiding, endorsing or opposing a particular religious belief, or from promoting belief versus non-belief. As Justice O'Connor recognized: "[T]he endorsement standard recognizes that the religious liberty so precious to the citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion or favoring particular beliefs over others."⁴ Moreover, government endorsement of a particular set of religious beliefs sends a powerful message of exclusion to non-adherents. Again, Justice O'Connor:

Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.⁵

Here, the government reserves a small number of TV channels in a community for educating the public. These channels are quite valuable—Cornerstone planned

¹See *Notice of Inquiry*, Docket No. 78-164, 43 Fed. Reg. at 30845 (1978) (setting forth processing standards for reserved channels).

²For example, the Commission stated that a program analyzing the role of religion in connection with historical or current events, various cultures, or the development of the arts generally would qualify as educational, while church services generally would not.

³See, e.g., *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S.Ct. 2168, 2179 (1998) ("Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.'" (citing *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)). See also *Finley*, 118 S.Ct. at 2183 (Scalia, J., concurring) ("It is preposterous to equate the denial of taxpayer subsidy with measures 'aimed at the suppression of dangerous ideas'" (citations omitted)).

⁴*County of Allegheny v. ACLU*, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring). See also *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 747 (1976) ("the state must confine itself to secular objectives and neither advance nor impede religious activity").

⁵*Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

to move to the noncommercial channel free of charge while selling its commercial channel for \$35 million. Because of their scarcity, the reserved channels are expressly intended “to serve the *entire* community to which they are assigned,”⁶ and to be “responsive to the overall public as opposed to the sway of particular political, economic, social or religious interests.”⁷ Thus, a prospective licensee cannot operate on a reserved channel unless and until the government concludes that its programming is primarily “educational” for the broader public.

In a religiously diverse society, sectarian religious programming, by its very nature, does not serve the “entire community” and is not “educational” to non-adherents. From a constitutional perspective, a government policy that endorses certain sectarian programming as “educational,” and awards exclusive use of a scarce public resource to permit those views to be expressed, would run afoul of the Establishment Clause. Indeed, programming that promotes adherence to a particular set of religious beliefs “inevitably ha[s] a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does not allow public bodies to foment such disagreement.”⁸ It is no answer to say that nonadherents need not watch those channels. That is like saying that the government can provide direct aid to the religious mission of sectarian schools because non-adherents can enroll elsewhere. Nor is it an answer to say that *all* religious programming is “educational.” First, the scarcity of reserved channels means that, as a practical matter, the government would be aiding and endorsing certain religious beliefs and not others. Second, the Establishment Clause not only prohibits government from aiding or endorsing a particular set of religious beliefs, it also prohibits government from aiding or endorsing religion over non-religion (or vice versa).

The majority clearly wishes that this entire subject would just go away. That has been the Commission’s unspoken policy through the years, and would have remained the policy had the people of Pittsburgh not pressed the issue. Now, having stuck their head out of their foxhole and drawing fire, the majority is burrowing back in as quickly and deeply as they can. The excuse for vacating the additional guidance—that our actions “have created less certainty rather than more”—would be laughable were the stakes not so high. The problem was not a lack of clarity, but that we were *too* clear. We actually tried to give meaning to our rule. What the majority really means is that they prefer a murky and unenforceable rule to a clear and enforceable one. Indeed, if our decision created uncertainty, the answer would be further clarification, not to vacate. The majority insists that it would like to have “the benefit of broad comment.” But where, one may ask, is the notice of rule-making? The seriousness of the majority’s rulemaking argument can be judged by how quickly it begins a proceeding. I doubt that a rulemaking on this subject will ever see the light of day.

In the end, the majority’s decision takes us back to where we were before this case began. Programming on the reserved channels still must be primarily educational. Programming about religion may still qualify as educational, but not all religious programming will qualify. The only difference now is that neither licensees nor the public will have the benefit of specific guidance. The majority’s mantra that we will defer to the licensee’s judgment unless that judgment is “arbitrary or unreasonable” simply begs the question—when does a licensee’s judgment cross the line and become arbitrary or unreasonable? The majority provides no clue. I cannot see how anyone is better off, other than those who oppose any enforceable rules in this area. I, for one, will continue to cast my vote in accordance with the views expressed in the additional guidance and in this statement.

Mr. TAUZIN. Thank you very much, Commissioner.

The Chair is now pleased to welcome Mr. Mark Dreistadt, Vice President, Administration and Finance, Cornerstone Television in Pennsylvania. Mr. Dreistadt?

STATEMENT OF MARK DREISTADT

Mr. DREISTADT. Mr. Chairman, members of the subcommittee, thank you for inviting me to testify before you today on behalf of Cornerstone Television which operates WPCB Television, Channel

⁶*Fostering Expanded Use of the UHF Channels*, 2 FCC 2d 527, 542 (1965) (emphasis added).

⁷*Noncommercial Nature of Educational Broadcast Stations*, 90 FCC 2d 895, 900 (1982).

⁸*County of Allegheny*, 492 U.S. at 651 (O’Connor, J., concurring).

40, Greensburg, Pennsylvania, a station with a largely religious format.

Cornerstone, as you know, was involved in a lengthy FCC proceeding with two other broadcasters to sell WPCB and to acquire a noncommercial educational station, WQEX in Pittsburgh on which Cornerstone proposed to air christian educational programming. I welcome this opportunity to comment on both H.R. 3525 and on H.R. 4201.

Early in 1997, Cornerstone entered a cooperative effort with two other broadcasters, WQED in Pittsburgh and also Paxson Communications Company. WQEX had suffered substantial financial losses and QED was already a licensee of Channel 13, another non-commercial, educational station in Pittsburgh and they wanted to sell QED and use the moneys therefrom to enhance their programming. So Cornerstone was willing to purchase WQEX and Paxson was willing to purchase Cornerstone's existing television station, and the appropriate assignment applications were filed with the FCC in the late spring of 1997.

Cornerstone Television continues to believe that this assignment would have been good for the community by adding additional diversity in the programming offered on noncommercial television stations in the Pittsburgh area.

Ultimately on January 18, 2000, after over 3 years of litigation at the FCC, Cornerstone terminated its cooperative effort to acquire Channel 16 and sell Channel 40 to Paxson. Cornerstone's President, Oleen Eagle stated, "Our decision to terminate this transaction was forced upon us by the unprecedented December 29 Order of the FCC which would have seriously jeopardized our ability to carry out our mission of broadcasting christian educational programming on Channel 16."

In the December 29 Order, the FCC approved the assignment of the noncommercial Channel 16 license to Cornerstone, however, the Commission Order contained a section entitled, "Additional Guidance" in which the Commission announced that more than 50 percent of Cornerstone's programming on Channel 16 would have to be educational. The FCC stated further that "not all programming, including programming about religious matters, qualifies as general educational programming." By way of example, the FCC declared that programming devoted to "religious exhortation, proselytizing statements of personally held religious views and beliefs and church services generally would not qualify as general educational programming."

We believe that ruling was arbitrary and capricious and raises serious First Amendment concerns. We believe that the FCC failed to recognize the cultural impact and benefit of religious programming.

The FCC's Order further stated that Cornerstone was obligated to comply with these newly announced standards and threatened that failure to do so could lead to appropriate action, which Cornerstone understood to include the loss of license to broadcast on Channel 16.

Since Cornerstone's mission requires us to broadcast programming that involves christian exhortation, evangelizing and statements of personal testimonies and personally held views, beliefs

and church services, we could literally be threatened with the loss of our primary means of carrying out our mission if we exchange the Channel 40 license for the Channel 16 license. Because of these problems, Cornerstone felt it had no alternative but to terminate the agreement.

The financial benefits of the transaction for Cornerstone would have been significant, about \$17.5 million, but there is no benefit that would justify the sacrifice of religious freedom required by the FCC Additional Guidance.

During the application process, Cornerstone repeatedly demonstrated its ability as an operator of a noncommercial educational channel. Cornerstone made modifications to the organization's mission statement, to its board of directors and to its overall program schedule in an attempt to more fully comply with the FCC's existing regulations.

Cornerstone was the subject of an inquiry into content that we feel is both inappropriate and unprecedented. It took significant time and expense but in the end, in its text of the December 29 Order, FCC stated, "We conclude that Cornerstone has provided a program schedule and description of programming that prevents us from denying its application. In fact, Cornerstone demonstrated in excess of over 100 hours weekly of Christian and religious educational programming that would be carried on our schedule."

Yet, in the same document, the FCC's Additional Guidance redefined the programming requirements thus creating an untenable situation for Cornerstone. To accept the grant would have required Cornerstone to comply with the Additional Guidance or operate in violation of the law. Since Cornerstone could accept neither of these options, termination of its agreements with the other broadcasters was the only recourse.

Cornerstone believes that the FCC's Additional Guidance for religious broadcasters operating on noncommercial educational channels clearly violated the First Amendment of the United States Constitution by singling out religious programming for special scrutiny, regulating content or religious speech or suppressing religious expression by prior restraint.

We also believe that the Additional Guidance was so vague and overbroad that it would be impossible for religious broadcasters operating on noncommercial educational television channels to determine what programming qualifies as educational programming.

On January 29, 2000, after overwhelming public opposition, the FCC vacated its decision insofar as it provided Additional Guidance. However, in that process, it did not disavow the principles of that guidance. The Commission acknowledged that its actions created less certainty rather than more and recognized the difficulty of minting clear definitional parameters for educational instructional or cultural programming without the benefit of broad comment.

However, the Commission's actions still leaves religious broadcasters who seek to operate on noncommercial educational channels in a quandary. For instance, in a Dissent Order vacating the Additional Guidance, Commissioner Tristani offered the opinion that the Commission's Additional Guidance was an attempt to give some clarity to existing precedent and added that "programming on

reserved channels must still be primarily educational and not all religious programming will qualify.”

We believe that the probability of subsequent attacks in this area is likely. We regret that the FCC action compelled us to terminate our transaction. We pray that the religious freedom issues raised by the FCC’s actions can be addressed in this legislative context. Cornerstone believes that the only safety for religious broadcasters who are broadcasting on noncommercial educational channels will be through legislation that protects the First Amendment rights of freedom of speech and freedom of religion for broadcasters.

The bills before us both address issues that are critical to granting religious broadcasters the same discretion and latitude given to all others who hold noncommercial licenses. Cornerstone maintains that religious programming is both cultural and educational and thereby meets the standards for general educational programming.

These bills will ensure that religious broadcasters across America will be guaranteed the freedom to broadcast programming that upholds the moral, spiritual and ethical fiber upon which our Nation was founded.

Mr. Chairman, members of the subcommittee, again, I appreciate this opportunity to share our views and look forward to answering any questions you may have.

[The prepared statement of Mark Dreistadt follows:]

PREPARED STATEMENT OF MARK DREISTADT, VICE PRESIDENT OF ADMINISTRATION & FINANCE, CORNERSTONE TELEVISION, INC.

Mr. Chairman, Members of the subcommittee, my name is Mark Dreistadt and I am Vice President of Administration and Finance of Cornerstone Television, Inc. Thank you for inviting me to testify before you today on behalf of Cornerstone which operates Station WPCB-TV, Channel 40, Greensburg, Pennsylvania, a station with a largely religious programming format. Cornerstone was involved in a lengthy FCC proceeding with two other broadcasters to sell WPCB-TV and to acquire non-commercial educational Station WQEX(TV), Pittsburgh, Pennsylvania on which Cornerstone proposed to air Christian educational programming. I welcome this opportunity to comment on H.R. 3525, the Religious Broadcasting Freedom Act and H.R. 4201, the Noncommercial Broadcasting Freedom of Expression Act of 2000.

In early 1997, Cornerstone entered into a cooperative effort with two other broadcasters—WQED Pittsburgh, the licensee of Station WQEX(TV), Channel 16, Pittsburgh and Paxson Pittsburgh License, Inc. WQEX had suffered substantial financial losses and WQED, which already was the licensee of WQED(TV), Channel 13, another noncommercial educational television station in Pittsburgh, wanted to sell WQED and use the monies obtained therefrom to enhance the programming on WQED. Cornerstone was willing to purchase WQEX and Paxson was willing to purchase Cornerstone’s existing television station on Channel 40. The appropriate assignment applications were filed with the Federal Communications Commission (“FCC”) in the late spring of 1997.

Ultimately, on January 18, 2000, after several years of litigation at the FCC, Cornerstone terminated its cooperative effort to acquire Channel 16 and sell Channel 40 to Paxson. As Cornerstone’s President, Oleen Eagle, stated: “Our decision to terminate the transaction was forced upon us by the unprecedented December 29, 1999 Order of the FCC which would have seriously jeopardized our ability to carry out our mission of broadcasting Christian educational programming on Channel 16.”

In the December 29th Order, the FCC approved the assignment of the non-commercial Channel 16 license to Cornerstone; however, the Commission Order contained a section entitled “Additional Guidance” in which the Commission announced that more than 50% of Cornerstone’s programming on Channel 16 would have to be educational. The FCC stated that “not all programming, including programming about religious matters qualifies as ‘general educational’ programming.” By way of example, the FCC declared that “programming devoted to religious exhortation, proselytizing, or statements of personally-held religious views and beliefs generally

would not qualify as 'general educational' programming." We believe that the ruling was arbitrary and capricious and raises serious First Amendment concerns.

The FCC's Order further stated that Cornerstone was obligated to comply with these newly announced standards and threatened that failure to do so could lead to appropriate action, which Cornerstone understood could include loss of the license to broadcast on Channel 16. Since Cornerstone's mission requires us to broadcast programming that involves Christian exhortation, evangelizing, statements of personally-held religious views and beliefs and church services, we could be threatened with the loss of our primary means of carrying out our mission if we exchanged the Channel 40 license for the Channel 16 license. Because of these problems, Cornerstone felt that it had no alternative but to terminate the agreement. The financial benefits of the transaction for Cornerstone would have been significant (\$17.5 million) but there is no benefit that would justify the sacrifice of religious freedom required by the FCC Additional Guidance.

During the application process, Cornerstone repeatedly demonstrated its ability to qualify as an operator of a noncommercial educational channel. Cornerstone made modifications to its organization's mission statement, to its Board of Directors and to its overall program schedule in an attempt to more fully comply with the FCC's existing regulations. In the text of its December 29th Order, the FCC stated, "...we conclude that Cornerstone has provided a program schedule and description of programming that prevents us from denying its application..." Yet in the same document, the FCC's Additional Guidance redefined the programming requirements, thus creating an untenable situation for Cornerstone. To accept the grant would have required Cornerstone to comply with the Additional Guidance or operate in violation of the law. Since Cornerstone could not accept either of these options, termination of its agreements with the other broadcasters was the only recourse.

Cornerstone believes that the FCC's Additional Guidance for religious broadcasters operating on noncommercial educational channels clearly violated the First Amendment to the United States Constitution by singling out religious programming for special scrutiny, regulating the content of religious speech and suppressing religious expression by prior restraint. We also believe that the Additional Guidance was so vague and overbroad that it would be impossible for religious broadcasters operating on noncommercial educational television channels to determine what programming qualifies as educational programming.

On January 28, 2000, after overwhelming public opposition, the FCC vacated its decision insofar as it provided Additional Guidance. The Commission acknowledged that its actions had created less certainty, rather than more, and recognized the difficulty of minting clear definitional parameters for "educational, instructional or cultural" programming without the benefit of broad comment. However, the Commission action still leaves religious broadcasters who seek to operate on noncommercial educational channels in a quandary. For instance, in a dissent to the Order vacating the Additional Guidance, Commissioner Tristani opined that the Commission's Additional Guidance was an attempt to give some clarity to its existing precedent and added that programming on the reserved channels still must be primarily educational and "not all religious programming will qualify."

We regret that the FCC action compelled us to terminate our transaction. We pray that the religious freedom issues raised by the FCC's action can be addressed in this legislative context. Cornerstone believes that the only safety for religious broadcasters who are broadcasting on noncommercial educational channels will be through legislation that protects the First Amendment rights of freedom of speech and freedom of religion for religious broadcasters.

The bills before this Subcommittee, H.R. 3525 and H.R. 4201, both address the issue that Cornerstone has faced and Cornerstone is very grateful for the support of the congressmen who sponsored these bills. H.R. 4201 is the more recent and more comprehensive of the two bills. Cornerstone supports the passage of this legislation with slight modifications. Specifically, Section 4 should state that any revisions to FCC regulations must be consistent with Section m (1) and (2). Section m (2)(C) should be clarified to make it clear that noncommercial educational licensees may not carry commercial advertising and that the "programming" referenced in the section does not include advertising.

Mr. Chairman and members of the Subcommittee, again, I appreciate the opportunity to share these views with you and I look forward to answering any questions that you may have. Thank you.

Mr. TAUZIN. Thank you.

The Chair now recognizes Mr. E. Brandt Gustavson, President, National Religious Broadcasters, Manassas, Virginia.

STATEMENT OF E. BRANDT GUSTAVSON

Mr. GUSTAVSON. Mr. Chairman and members of the committee, thank you for inviting National Religious Broadcasters to provide testimony today.

On behalf of NRB's 1,250 member organizations let me express our gratitude for the way many of you swiftly and firmly came to the defense of religious broadcasters when the FCC released its ruling on Cornerstone Television in December. It is encouraging to see so many men and women in Congress stand up for the fundamental liberty of religious expression.

National Religious Broadcasters was formed in 1944 by a small group of christian broadcasting pioneers with the purpose of maintaining access to the air waves for the gospel message. The threat then was the Federal Council of Churches, now known as the National Council of Churches trying to strike an agreement with the networks and the large stations in communities across the Nation to act as gatekeeper for all religious programming.

With the Federal Council of Churches choosing who gets network air time, this would have certainly been the end of the broadcast ministries of great preachers and teachers by Charles Fuller, Walter Maier, Myron Boyd, Theodore Epp and Mr. DeHaan. We are proud to say that we are an association of christian broadcasters. It is our byline.

Today, the threat of the Federal Communications Commission, a government agency which has at times overstepped its authority by acting outside of its congressional mandate and making unconstitutional policy decisions without the benefit of public notice or comment in its attempt to restrict our fundamental freedom of religious expression.

In what has become known as the Cornerstone decision, the FCC granted Cornerstone Television of Pittsburgh permission to move from its commercial Channel 40 to noncommercial educational channel 16, a decision that would have provided millions of dollars for Cornerstone to produce quality programming and continue broadcasting the gospel.

In adopting this Order, as we have heard, the FCC singled out religious programming for a new set of rules to determine eligibility toward a new quota of educational programs that non-commercial educational TV stations were expected to provide. In its Additional Guidance, the FCC required more than half of the programming hours on a reserved channel to be devoted to serve the educational, instructional or cultural needs of a community of license.

The Commission said it would defer to the judgment of the broadcaster in determining what programs meet those needs but apparently not in the case of religious programming. The Commission specifically singled out religious programming for new rules. On page 24 of the Decision, the Commission said, "Church services and programming primarily devoted to religious exhortation, "which by the way we call sermons and bible studies," and "proselytizing" which we call evangelism "or statements of personally held religious views," which we call testimonials that "they generally would not qualify as general educational programming." This

constituted a severe restriction on an important category of religious speech, the core of our message.

The FCC said it would not disqualify any program simply because the subject matter of the teaching or instruction is religious in nature; in fact, they went on to describe religious programming that would qualify as educational, “programs analyzing the role of religion in connection with historical or current events, various cultures or the development of the arts exploring the connection between religious belief and physical and mental health, and examining the apparent dichotomy between science, technology and established religious tenets or studying religious text from a historical or literally perspective” all meet with the FCC’s approval.

Thus, in effect, the FCC created a category of politically correct government-approved, religious speech and that is abhorrent to us and unacceptable. Essentially, the FCC seems to think it is permissible for programs to talk all about religion in academic or intellectual terms but when the programs become more passionate, emotional, personal or originates from a church, it is somehow less educational, instructional or cultural.

Even though this Additional Guidance was formerly directed to only noncommercial educational TV stations, the majority of NRB members are radio broadcasters. We have 1,730 religious broadcasting stations in the United States. They understandably feared this decision might be a first step toward new restrictions on educational FM, 88 to 92 on the FM band.

Not only was the decision troublesome, but the manner in which it was delivered raised serious concerns. The original decision was adopted on December 15 but was not made public until December 29 when Congress was out of session and the Nation was in the midst of celebrating Christmas and New Years and preparing for the lights to go out on New Years Day. It had all the appearances of a stealth decision flying below the radar.

Fortunately, the Cornerstone decision did not go unnoticed. In a beautiful demonstration of democracy in action, which by one of the Commissioners was called demagoguery, many of you on this committee responded swiftly. In addition, many christian broadcasters went on the air with this news and in turn, thousands of citizens prayed and flooded Capitol Hill and the FCC with phone calls, letters and e-mail pleading for a reversal and I personally say that we in the NRB office did 135 interviews and program material to secular and religious stations all across the country. It wore us out frankly but it was effective.

In the end, the FCC vacated the Additional Guidance, a decision we are thankful for but Cornerstone decided not to move, as Mark says, to Channel 16 and have suffered an enormous financial loss because it was concerned that these restrictions will come back to life 1 day and severely inhibit their ability to broadcast the gospel.

Mr. Chairman, we must finish the job. Bad ideas in Washington never seem to go away. They are often resurrected one piece at a time. We must not allow this to happen with the Cornerstone decision. We fear that the underlying philosophy that allowed such a decision in the first place is still alive at the Commission. We are asking the Lord to give you and this committee the wisdom to pro-

vide a legislative solution that will prevent the FCC from taking this kind of unconstitutional action again.

We stand in full support of the noncommercial Broadcasting Freedom of Expression Act, recently introduced by Congressman Pickering. This bill takes a new approach to the problem while incorporating the best ideas of the other legislation from Congressman Oxley and Senator Hutchinson and we respectfully ask for the committee to act swiftly and unanimously to pass the Pickering bill to the House floor for a vote.

We believe that the freedom of religious expression is an issue that transcends party lines because of the basis of our development as a Nation. This is a time to set aside political divisions and join together to protect our liberty. Once this bill is passed, we trust our freedom of religious speech will be protected from any activist government agency.

God bless you and thank you for the opportunity to testify today.
[The prepared statement of E. Brandt Gustavson follows:]

PREPARED STATEMENT OF E. BRANDT GUSTAVSON, PRESIDENT, NATIONAL RELIGIOUS BROADCASTERS

Mr. Chairman and members of the committee, thank you for inviting National Religious Broadcasters to provide testimony today. On behalf of NRB's one thousand-two hundred and fifty member organizations, let me express our gratitude for the way many of you swiftly and firmly came to the defense of religious broadcasters when the FCC released its ruling on Cornerstone Television in December. It is encouraging to see so many men and women in Congress stand up for the fundamental liberty of religious expression.

National Religious Broadcasters was formed in 1944 by a small group of Christian broadcasting pioneers with the purpose of maintaining access to the airwaves for the gospel message. The threat then was the Federal Council of Churches, now known as the National Council of Churches, trying to strike an agreement with the networks to act as gatekeeper for all religious programming. With the Federal Council of Churches choosing who gets network airtime, this would have certainly been the end of the broadcast ministries of great preachers and teachers like Charles Fuller, Walter Maier, Myron Boyd, Theodore Epp, and M.R. DeHaan.

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In what has become known as the Cornerstone decision, the Federal Communications Commission granted Cornerstone Television of Pittsburgh, Pennsylvania, permission to move from its commercial channel 40 to non-commercial/educational channel 16—a decision that would have provided millions of dollars for Cornerstone to continue broadcasting the gospel. But in adopting this order, the FCC singled out religious programming for a new set of rules to determine eligibility towards a new quota of educational programs that non-commercial/educational TV stations were expected to provide.

In its additional guidance, the FCC required more than half of the programming hours on a reserved channel to be devoted to serve the educational, instructional, or cultural needs of the community of license. The Commission said it would defer to the judgment of the broadcaster in determining what programs meet those needs—but apparently not in the case of religious programs.

The Commission specifically singled out religious programming for new rules. On page 24 of the decision, the Commission said that church services and “programming primarily devoted to religious exhortation, proselytizing, or statements of personally held religious views and beliefs generally would not qualify as ‘general educational’ programming.”

This constituted a severe restriction on an important category of religious speech, the core of the gospel message.

The FCC said it “would not disqualify any program simply because the subject matter of the teaching or instruction is religious in nature.” In fact, they went on to describe religious programming that WOULD qualify as educational. “Programs

analyzing the ROLE of religion in connection with historical or current events, various cultures, or the development of the arts; exploring the *connection* between religious belief and physical and mental health; *examining* the apparent dichotomy between science, technology and established religious tenets, or studying religious texts from a historical or literary perspective" all meet with the FCC's approval. Thus, in effect, the FCC created a category of *politically correct government approved religious speech!*

Essentially, the FCC seems to think it is permissible for programs to talk ABOUT religion in academic or intellectual terms, but when the program becomes more passionate, emotional, personal or originates from a church it is somehow *less* instructional, educational or cultural.

Even though this additional guidance was formally directed only to non-commercial educational TV stations, the majority of NRB members are radio broadcasters who understandably feared that this decision might be a first step toward new restrictions on radio.

Not only was the decision troublesome, but the manner in which it was delivered raised serious concerns. The original decision was adopted on December 15th, but was not made public until December 29th when Congress was out of session and the nation was in the midst of celebrating Christmas and preparing for the lights to go out on New Year's Day. It had all the appearances of a stealth decision flying below the radar.

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In the end, the FCC vacated the additional guidance, a decision we are thankful for. But, Cornerstone decided not to move to channel 16 and has suffered an enormous financial loss because it was concerned that these restrictions will come back to life one day and severely inhibit their ability to broadcast the gospel.

Mr. Chairman, we must finish the job. Bad ideas in Washington never seem to go away; they are often resurrected a piece at a time. We must not allow this to happen with the Cornerstone decision. We fear that the underlying philosophy that allowed such a decision in the first place is still alive at the Commission. We are asking the Lord to give you and this committee the wisdom to provide a legislative solution that will prevent the FCC from taking this kind of unconstitutional action again.

We stand in full support of the Noncommercial Broadcasting Freedom of Expression Act recently introduced by Congressman Pickering. This bill takes a new approach to the problem while incorporating the best ideas of the other legislative ideas from Congressman Oxley and Senator Hutchinson. We respectfully ask for the committee to act swiftly and unanimously to pass the Pickering bill to the House floor for a vote. We believe that the freedom of religious expression is an issue that transcends party lines because it is the basis of our development as a nation. This is a time to set aside political divisions and join together to protect our liberty.

Once this bill is passed, we trust our freedom of religious speech will be protected from an activist government agency. God bless you and thank you for the opportunity to testify today. I will be happy to answer any questions you may have.

Mr. TAUZIN. Thank you, Mr. Gustavson.

Now, the Chair is pleased to recognize the gentleman from Mississippi, Mr. Pickering for an introduction.

Mr. PICKERING. Thank you, Mr. Chairman.

I have the pleasure today of introducing Mr. Don Wildmon from my home State of Mississippi who is the father of four, the author of more than 22 books with a million copies in print, educated at Millsaps College in Jackson, Mississippi with a Master of Divinity from Emory University, with honorary doctorates from a number of outstanding educational and theological institutions.

His recent contribution to our country and our culture is through the American Family Association which has more than 130 radio stations and a journal with circulation of half a million. He has been a consistent and strong voice and force for both freedom, for

family and for faith. I am glad he can come today to testify on the need to protect those and to be ever vigilant.

Thank you, Mr. Chairman.

STATEMENT OF DON WILDMON

Mr. WILDMON. The action by the FCC in December came as a shock to me and many others in the broadcasting industry. Many of us were greatly disturbed by that action. We were disturbed by the manner in which the action came. There were no public hearings in the matter. The FCC went outside its normal standards of operation, it did not seek public input.

We were disturbed by the fact that the decision was made by a 3 to 2 vote, with the vote being along party lines. We were disturbed by the fact that the decision came when Congress was in recess. We were disturbed by the definition of educational program given by the FCC. Under their definition, a sermon by Dr. Billy Graham would not have been classified as being educational but a program featuring Howard Stern would be.

We feel that our concerns were justified by the fact that the FCC rescinded their action a month later. We feel that legislation protecting the freedom of speech for the religious broadcaster must be enacted to protect that freedom from being usurped by the FCC in the future. Freedom of speech for the religious broadcaster should be no different than that of any other entity.

Thank you.

Mr. TAUZIN. Thank you, Mr. Wildmon.

The Chair recognizes himself and other members in order.

Let me first try to find out how this happened. This obviously happened indeed while we were out of session. It happened in regard to a transfer of license request regarding a religious broadcaster and it happened on a 3 to 2 vote by the Commission without hearing or public comment.

I would ask either one of our two Commissioners if they would like to give us an explanation of how this sort of thing happens and why was a religious broadcaster chosen as the vehicle for these new definitional standards of education and cultural programming?

Ms. TRISTANI. Mr. Chairman, the proceeding was a restricted proceeding under which certain rules apply. One rule is that we cannot discuss issues that are not public. But I will tell you that certain Members of Congress were writing to us constantly about deciding the case. The actual decision was rendered around December 15.

Mr. TAUZIN. Are you telling us the decision was made in response to Members of Congress asking you to do this?

Ms. TRISTANI. Yes, on the date it was rendered. Yes. I will tell you that, sir.

Mr. TAUZIN. But you can't tell us who they were because that is restricted?

Ms. TRISTANI. No, there are letters in the record. Actually, Senator McCain sent a letter stating he wanted to see a decision by December 15.

Mr. TAUZIN. If you don't decide the issue of the license transfer. There was no request by Members of Congress asking you to do this Additional Guidance, was there? Where did that come from?

Ms. TRISTANI. Let me tell you where it came from since I voted for the Additional Guidance, and I voted not to vacate the Additional Guidance.

Mr. TAUZIN. Yes, please.

Ms. TRISTANI. Under normal cases, we don't get into, as we did in this case, what the programming is, but there was opposition by citizens in Pittsburgh who questioned the educational programming of the broadcaster. We got involved because of that.

Mr. TAUZIN. So who originated the language that was quoted to us by Mr. Gustavson? Where did that language come from? Was it something you wrote, was it something staff wrote?

Ms. TRISTANI. I contributed to it, sir.

Mr. TAUZIN. So these were actual contributions by the members of the three majority?

Ms. TRISTANI. I can't speak for my other Commissioners. I know I contributed to it, sir.

May I clarify something, Mr. Chairman?

Mr. TAUZIN. Yes, please.

Ms. TRISTANI. I dissented from the license transfer because I think this should have been sent to one of our administrative law judges.

Mr. TAUZIN. You received a letter I am sure, it is a part of the folders for all the members, dated January 19, 2000 in which I wrote to Chairman Kennard, expressing my deep concern over this Additional Guidance and asking that each one of the FCC Commissioners respond in writing to a list of questions I submitted to you.

Among those questions were some I am going to ask you today but first of all, did you respond to that request in writing?

Ms. TRISTANI. Sir, I did not because I believe the date the response was due was after the Commission vacated.

Mr. TAUZIN. So you felt no need to answer the questions?

Ms. TRISTANI. I thought it was moot.

Mr. TAUZIN. Because it was vacated?

Ms. TRISTANI. That is what I thought.

Mr. TAUZIN. Let me ask a few of those questions.

In vacating the Order, the Commission basically said, we are going back to previous policy that gives discretion to the licensee to make determinations and only when it is arbitrary and capricious will we ever step in and act. What necessitated departing from that previous policy in your mind and in the minds of the other two members who voted for it?

Ms. TRISTANI. We didn't depart from the policy standard of "arbitrary and unreasonable."

Mr. TAUZIN. But you departed from the policy of giving discretion to the licensees to a policy where you very carefully articulated what was and was not acceptable religious programming. What made you decide to do that?

Ms. TRISTANI. In this case, because citizens in Pittsburgh and elsewhere questioned what was educational.

Mr. TAUZIN. Let us talk about that. I asked you these questions in the list of questions I sent you. Handel's Messiah is a beautiful piece, Amazing Grace a beautiful song. Why in your instructions in these Additional Instructions were those beautiful songs considered

educational or cultural played at the Kennedy Center but not in a church service?

Ms. TRISTANI. I don't recall that we specifically used those beautiful pieces of music.

Mr. TAUZIN. But as I read your instructions as Mr. Gustavson read to us today, it basically says a church service where that music was played would not be considered educational or cultural.

Ms. TRISTANI. As I said in my statement, one of the big concerns I have—and it is based on the establishment clause—is that religious is something very, very different. Religion raises some questions for nonadherents.

Mr. TAUZIN. But didn't you realize that when you particularize what was acceptable and not acceptable.

Ms. TRISTANI. We gave examples, Mr. Chairman, and we also said that in certain instances, church services might be educational.

Mr. TAUZIN. But who was going to make that decision? You were going to make that decision? You were going to decide what church services were okay and which were not to be broadcast?

Ms. TRISTANI. If I could comment, Mr. Chairman. We never said you cannot broadcast those services on a reserved channel.

Mr. TAUZIN. You just wouldn't count them.

Ms. TRISTANI. We wouldn't count them toward the 50 percent.

Mr. TAUZIN. Then you would decide.

Ms. TRISTANI. No, because you still would have a broad range of 49 or 49.5, however you count it exactly.

Mr. TAUZIN. But if station could lose its license if it didn't reach your percentage of qualified programming.

Ms. TRISTANI. We weren't going to go out there and count.

Mr. TAUZIN. Were you not putting yourself in the position of making judgments as to what was acceptable religious programming and what was not?

Ms. TRISTANI. The reason we might be in that position would be because of not running afoul of the establishment clause, and of the dangers that can be posed when religion is imposed on people that are not of that same religion or nonbelievers, and all of the adherence dangers. If I may quote from Justice O'Connor in another case in County of Allegheny, "The essential command of the establishment clause is that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or disfavored."

"We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval toward citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of a political community."

Mr. TAUZIN. But you, in your instruction to these religious broadcasters told them, "Church services generally will not qualify as general educational programming under our rules. However, church services which are part of a historic event, such as a funeral

of a national leader, would qualify." You, in fact, put yourself in the position of deciding what church service, what religious activities would qualify, therefore would keep a station on the air or not.

Ms. TRISTANI. That was by way of example, Mr. Chairman, and it was not aimed just at religious broadcasters but at those who broadcast on the reserved channels, a very small sliver of the spectrum that is reserved for primarily educational public purposes.

Mr. TAUZIN. Did that example have the force of law as far as the Commission was concerned? Did it have the force of law, Commissioner Furchtgott-Roth? I see you shaking your head. Did it?

Mr. FURCHTGOTT-ROTH. Yes.

Mr. TAUZIN. Yes, it did. So the Commission was, by these examples, forcefully declaring what types and forms of religious programming and services would be acceptable to keep a license and which would deny a station its license.

Ms. TRISTANI. What would be counted toward the educational portion of the broadcast.

Mr. TAUZIN. Let me ask you Ms. Tristani and Mr. Furchtgott-Roth, would either of you favor a rulemaking to put this Additional Guidance back into effect?

Ms. TRISTANI. I would favor a rulemaking if it would clarify the educational standards that we have in place. I would. That ought to be clear.

Mr. TAUZIN. Mr. Furchtgott-Roth?

Mr. FURCHTGOTT-ROTH. Mr. Chairman, I have been at the Commission for about 2½ years. There have been many things I have disagreed with but the scariest moment, the most frightening moment, the most chilling moment at the Commission was when staff asked me if I wanted to review videotapes.

I will never support any move to have the government placed in the position of deciding whether programming fits into one pigeon hole or another. It is just abhorrent to me. To say that religious broadcasting fits into this pigeon hole or that pigeon hole is not the role of government.

Mr. TAUZIN. My time has expired.

The Chair recognizes the gentleman from Massachusetts, Mr. Markey, for a round of questions.

Mr. MARKEY. Thank you, Mr. Chairman.

I apologize that I was not here when opening statements were made. That was only because we had a roll call on the floor and I had another very brief engagement that I had to attend to.

First, I would like to begin by saying to our witnesses who are unfamiliar with the Congress, that if all Federal agencies were unable to act when Congress was out of session, and this particular Congress, it would mean that for the most part, no Federal agency would be able to act for at least half of the year.

That might be the wish of some particular antigovernment philosophy but it would be impractical in terms of the operation of the very important functions, whether it be health, safety or education for Americans. So when agencies, including the Federal Communications Commission, act when Congress is out of session, they are doing it as is every other agency for every other part of the Government in order to advance the public wellbeing, whether any one of us may agree or disagree with any of those decisions.

This hearing comes on the heels of decisions at the Federal Communications Commission dealing with television license transfers and appended clarifying guidance that was issued to ensure that the Federal Communications Commission's noncommercial educational licensees serve the entire community with programming that was primarily educational.

There are a number of misconceptions that I believe are associated with these decisions which culminated in the Federal Communications Commission subsequently deciding to vacate the Additional Guidance issued in the decision affecting WQED, Pittsburgh and Cornerstone Television.

First, there is a notion that the Federal Communications decision reflected a bias against religion. Far from a bias against religion, it must be remembered that Cornerstone was requesting—no pun intended—a special blessing from the Federal Communications Commission to broadcast on a station reserved primarily for public education, as distinguished from religion.

Second, there was an allegation that the Federal Communications Commission was restricting religious speech. Religious broadcasters are not restricted in broadcasting religious programming, and many do so throughout the country on commercial broadcast stations. The question here is, not whether religious messages are being restricted because they are not, but rather the nature of requirements for licensees on noncommercial educational stations.

I do not question whether religious programming is often educational. In fact, I believe that many of the programs on religious programs are quite beneficial to many viewers especially when contrasted with much of the programming on commercial television generally.

Moreover, the Federal Communications Commission rules permit programming about religion to qualify as educational. The question again is whether religious programming from a particular religious broadcaster serves in a Nation founded upon religious diversity and religious freedom the entire community and is educational to those of other religions. To ask that question doesn't mean one is either antireligion or against religious programming. It simply questions whether the distinction between commercial and noncommercial licensees has any meaning.

In particular, I also want to note with deep concern legislation introduced by other members of this committee, including the subcommittee chairman. I am not sure whether the solution proposed might not make the alleged problem worse. If you believe in the separation of church and State, then we tread on very dangerous ground when sectarian messages intended for the followers of a particular religion are licensed to displace nonsectarian educational messages intended for the entire community.

Second, I am not sure if the sponsors of the legislation intended in headlong pursuit of ensuring that no one at the FCC could pass judgment on whether religious programming was educational or to simultaneously eviscerate the Children's Television Act requirements for noncommercial stations. Every licensee under the rules implementing the Children's Television Act must air a paltry 3 hours a week of programming for the child audience.

I would hope that the sponsors would reconsider the language in their bill to ensure that educational programming requirements for children, whether such programming is religious or not, is not undermined by the bill before the subcommittee today.

At this point, Mr. Chairman, I would also ask that the hearing record remain open the customary 2 weeks. I have statements from parties that I would like to have inserted in the record.

I thank you for allowing me to make my opening statement at this time.

Mr. TAUZIN. Without objection, the gentleman's request that the record remain open for 2 weeks is permitted. Without objection, so ordered. The record will so remain open.

The Chair thanks the gentleman.

The Chair will recognize the vice chairman of our subcommittee, the author of one of the bills before us today, the gentleman from Ohio, Mr. Oxley.

Mr. OXLEY. Thank you, Mr. Chairman.

As we all know, the FCC decision on December 29 elicited a letter signed by myself and Congressmen Pickering, Largent and Stearns to Chairman Kennard objecting to the Commission's action. We said in that letter the Commission has no business whatsoever singling out religious programming for special scrutiny. We go on to say, "We advise you to reverse this ruling or stand by and see it overturned legislatively or in court."

The response we received from Chairman Kennard on January 12 said "The Commission's decision in this case does not establish new rules but simply clarifies longstanding FCC policy." We then immediately wrote back and said, we had drafted the Religious Broadcasting Freedom Act which was introduced on January 24 with 60 original co-sponsors, and we now enjoy 125 co-sponsors on that legislation. This is kind of setting the stage for only what occurred at the Commission.

Commissioner Tristani, I would like to ask you, in your dissenting statement you say that the Commission has "capitulated to an organized campaign of distortion and demagoguery." Is that correct?

Ms. TRISTANI. Yes, sir.

Mr. OXLEY. You still stand by that?

Ms. TRISTANI. Yes, sir.

Mr. OXLEY. Do you feel this campaign could have been avoided if the Commission had simply proceeded with a rulemaking as is normally consistent when these kind of major policy decisions are made?

Ms. TRISTANI. Probably not. Not if we had come up with the same result.

Mr. OXLEY. Obviously a large part of the public had something to say on this issue and the pressure campaign you speak of only had to occur because the Commission simply didn't give them the appropriate avenue in which to express their concerns. Do you agree with that?

Ms. TRISTANI. No.

Mr. OXLEY. Why not?

Ms. TRISTANI. Well, because I think given the emotion that it is still generating and the e-mail I am getting, and I am sure all of

you are getting, I think it is the kind of issue that even were it dealt with in a rulemaking—you could do it in many different ways—but it would still generate a lot of concern.

Mr. OXLEY. You don't think the rulemaking procedure where the public has an opportunity to comment, that it wouldn't have had a different result initially?

Ms. TRISTANI. Sir, as I was explaining earlier, this was a license transfer application and it was not a rulemaking procedure. That is why the issue came up in this particular case.

Mr. OXLEY. Did you think this was a major shift in policy by the FCC?

Ms. TRISTANI. No, sir. I think it was a clarification of our rules.

Mr. OXLEY. Commissioner Furchtgott-Roth, do you agree that this was perceived by the members of the Commission as not a major change in policy at the FCC?

Mr. FURCHTGOTT-ROTH. Mr. Oxley, I wish I could tell you whether it was or not. I can tell you that I am deeply distressed that any government agency would be reviewing videotapes.

Mr. OXLEY. Let us get into that a minute. If in fact the decision by the FCC were to have the effect, as many of us here thought, that it was the intrusion of the Federal Government into making decisions on content, would you not consider that to be a major decision by the Federal Communications Commission?

Mr. FURCHTGOTT-ROTH. Yes, Mr. Oxley. The only thing I can't address is whether or not that has been going on at the Commission. I find Chairman Kennard's statement that this was just a codification of prior Commission practice extraordinarily disturbing. I can't speak to that prior Commission practice.

Ms. TRISTANI. Could I add something?

Mr. OXLEY. Sure.

Ms. TRISTANI. Just to respond a little bit to my colleague, the Commission regularly reviews indecency and obscenity complaints, both audio and video, so it is something we do based on some of our rules.

Mr. OXLEY. Commissioner Tristani, you say apparently the Commission capitulated to an organized campaign of distortion and demagoguery. Are you accusing Mr. Gustavson and Mr. Dreistadt and others of distortion and demagoguery?

Ms. TRISTANI. I am not accusing anyone personally.

Mr. OXLEY. You mentioned the establishment clause in your testimony. Do you see anything in the pending legislation of either bill that would cause problems with the establishment clause that we are considering today?

Mr. FURCHTGOTT-ROTH. Mr. Oxley, I am not a constitutional expert and I would urge you to ask someone who is that question and I would hope any legislation you might consider would avoid any such problems. I do not believe that there is any existing establishment clause problem with permitting broadcasters in the non-commercial educational band to self-certify.

These issues that are being raised about the establishment clause, with all due respect, I think are simply incorrect.

Mr. OXLEY. Thank you.

Mr. TAUZIN. Thank you.

The Chair will now yield to the vice chairman of the full committee, Mr. Gillmor.

Mr. GILLMOR. Thank you, Mr. Chairman.

I would like to follow up with Commissioner Tristani on a couple of things. You indicated the reason you got into this content aspect on the transfer was because of complaints from citizens from Pittsburgh.

Ms. TRISTANI. Yes, sir, this was a contested application.

Mr. GILLMOR. What was the nature of the complaints, who complained, what was the volume of them? Was this hundreds of letters, one specific group?

Ms. TRISTANI. I think specifically from the city of Pittsburgh, there were maybe 300 letters. But I am not sure of these numbers, that is what I recall. I think it is in our original December 28 decision. I think there were about 30,000 e-mails from around the country protesting the application. There may have been 50 or 100 letters in favor of the application.

Mr. GILLMOR. What was the basis of those complaints?

Ms. TRISTANI. They questioned the educational programming, whether that licensee would be satisfying the programming requirement that is imposed or that is required of anyone who is on the reserved channels, whether religious broadcasters or not.

Mr. GILLMOR. Are those complaints a matter of public record?

Ms. TRISTANI. I am not sure because this is a restricted proceeding and I know part of it is in the public record and part of it is not, but I would be glad to explain that more fully after I talk to counsel.

Mr. GILLMOR. Would these complaints be any different than, for example, if a Member of Congress has expressed a view on the transfer? Would that be a matter of public record?

Ms. TRISTANI. Probably. I was just told that yes, these complaints would be a matter of public record.

Mr. GILLMOR. The complaints are?

Ms. TRISTANI. Yes.

Mr. GILLMOR. Just one other question because the rhetoric it appeared to me was rather heated from a number of areas, including from yourself when you used terms such as "distorting" and "demagoguery." Would you specify who the demagogues were?

Ms. TRISTANI. Again, I don't have knowledge of who specifically said what but I got a lot of e-mails, our Commission got a lot of e-mails accusing us of being anti-religious, very nasty stuff.

Mr. GILLMOR. But you don't know who did that?

Ms. TRISTANI. I have the e-mails from a lot of citizens and a lot of people.

Mr. GILLMOR. Thank you.

Mr. TAUZIN. The Chair recognizes the gentleman from Mississippi, Mr. Pickering.

Mr. PICKERING. Thank you, Mr. Chairman.

I am very appreciative that we are having this hearing, that we are moving legislation to ensure that what was attempted does not occur and that there is no possibility in the future for it occurring.

I am also extremely disappointed that we find ourselves here today. Commissioner Tristani begins her dissenting comments, "This is a sad and shameful day for the FCC." Let me just say for

the record, I feel it is a sad and shameful day that Congress has to stop a government agency from attempting to limit, to restrict and regulate religious expression of liberty.

Let me also say for the record that I take offense to the rhetoric and let me also say that nobody on this panel that I have heard today has used extreme rhetoric. They have defended their rights to broadcast their beliefs, their liberty, their freedom, the common, shared American values.

They did not accuse anyone that I have heard of demagoguery, of distortion or witch hunts. I will say that language, that extreme rhetoric and that extreme language did come from Commissioner Tristani, so the demagoguery and the distortion and the extreme rhetoric, let the record show, did not come from the gentlemen promoting and defending religious expression. It came from those who are trying to regulate and restrict that core American value.

Having said that, let me try to understand the logic of the dissenting view and the basis for the action which almost occurred. As I listened to the testimony and read the dissenting statement, it seems to flow with this logic, license transfer equals endorsement equals establishment.

Commissioner Tristani, is that your constitutional logic in trying to clarify the guidelines, license transfer equals endorsement equals establishment?

Ms. TRISTANI. I don't think that is what I said, sir.

Mr. PICKERING. Please clarify to me your logic on this and let me ask another question to better understand the context. You cite Justice O'Connor. Has there ever been any court decision that has directly addressed the question of FCC license transfers as it relates to commercial or noncommercial religious broadcasters or religious expression?

Ms. TRISTANI. I do not believe there has been a Supreme Court decision addressing that. No, sir.

Mr. PICKERING. So you are taking the Supreme Court decision on the establishment clause and trying to build a case in your guidelines. I am trying to understand your constitutional logic, that license transfer equals endorsement equals establishment.

Ms. TRISTANI. I think anytime we are dealing with religion, we have to look at the establishment clause. Yes.

Mr. PICKERING. So license transfer equals endorsement of the views expressed?

Ms. TRISTANI. No. Those are not my words, sir.

Mr. PICKERING. But if you boil this down in simplicity, that is what you are saying and then you go further. Let me just use Justice O'Connor's words in relation to what you tried to do. You can either endorse or oppose a particular religious belief. Let me see if this would oppose or disfavor a particular religious view.

For example, "Programming primarily devoted to religious exhortation, proselytizing, or statement of personally held religious views and beliefs generally would not qualify as general education programming." So you have just given a guideline that opposes a particular religious expression and then you try to qualify what is acceptable.

Ms. TRISTANI. No.

Mr. PICKERING. So not only do you oppose specific religious expression.

Ms. TRISTANI. Sir, I do not oppose specific religious expression.

Mr. PICKERING. These are your words, "For example, programming primarily devoted to religious exhortation, proselytizing or statements of personally held religious views and beliefs generally would not qualify as general education."

Ms. TRISTANI. What the guideline said was that they would not qualify for the part that is the general education requirement because in my deeply held belief that because we are such a religiously diverse society, what might be educational for me in the religious context as a Catholic, might not be educational for some of my staffers that are Jewish.

Mr. PICKERING. So we need a government commission to decide what religion is educational, cultural or instructional?

Ms. TRISTANI. No, sir. I am concerned about non-adherence and government sending the message that they favor a particular religion or no religion.

Mr. PICKERING. You specifically get into content regulation of opposing what is, in your view, unacceptable and then giving a category of acceptable speech. If you read the same court decision from Justice O'Connor, I would argue that she prohibits exactly what you cite as the basis for your decision. You are favoring one set of speech and you are opposing or prohibiting another set of speech.

Ms. TRISTANI. Sir, I would disagree with that. Everybody interprets cases differently but I would again stress we are talking about reserved channels here, a small sliver of the spectrum that government has set aside for educational purposes.

Mr. PICKERING. But by your constitutional logic as I understand it, license equals endorsement equals establishment, you are setting a very dangerous precedent, not only for noncommercial licenses but for commercial licenses. What is also very offensive to me is that you are trying to change, whether you try to minimize it by saying this is simply guidelines or clarification, this is substantive constitutional change of policy done in an undemocratic, closed process with no public comment period, not following the Administrative Procedures Act. It is classic, and unfortunately not the classic liberal in the best sense of the word, but it is the classic liberal tendency to try to get through government procedures or court decisions what this country will not tolerate, an end run around what we have set up as a decisionmaking body, whether it is the legislative body or trying to set some new constitutional interpretation of what is or is not religiously acceptable speech.

Ms. TRISTANI. Sir, I was just trying to do the best I could in a license transfer where we are charged with ensuring that the channel is primarily educational.

Mr. PICKERING. Let me say this. We are going to do everything we can to keep your views from ever happening.

Mr. TAUZIN. The Chair recognizes the gentleman from Florida, Mr. Stearns.

Mr. STEARNS. Thank you.

I want to thank the witnesses for coming and, Commissioner Tristani, your courage in also expressing your views. It is your right to do so.

Many of us feel that the FCC in itself as a body should be reformed. Chairman Tauzin and others, and Mr. Gillmor from Ohio have a bill to reform the FCC.

If you look at the computer industry and you talk about what has happened there, the innovation, they did not have an FCC. For many of us, the innovation that could occur in the telecommunications industry could occur much rapidly without the FCC as an oversight body, as a bureaucracy trying to regulate and to endorse programming and to make decisions which consumers could make.

In this case, I think as Mr. Pickering has pointed out, you have misinterpreted the establishment clause which is part of the First Amendment and I think in your quote of Justice Sandra O'Connor, you have misinterpreted, at least from our standpoint on this side, what she was saying.

I think what has touched me the most is when Commissioner Furchtgott-Roth said that he felt chills when staff asked him would you like to look at videos. Let me ask you, have you looked at videos and made some decisions yourself, that would say to yourself, this is not educational programming? Have you made that in your own judgment?

Ms. TRISTANI. I did look at videos over a year ago and that is when I thought this should go to an administrative law judge to decide. I thought that was the proper procedure.

Mr. STEARNS. Would it be appropriate for you to tell us what videos you looked at?

Ms. TRISTANI. It was so long ago, I don't recall.

Mr. STEARNS. Let me give you a couple of examples and maybe you could tell me. If I showed you a video in which a television broadcaster and other individuals advocated individuals in the audience to lead a life according to the principles of the Ten Commandments, how would you view that? Do you think that is educational or religious?

Ms. TRISTANI. It could be educational to some and religious to others.

Mr. STEARNS. To you, how do you feel that is?

Ms. TRISTANI. On a personal level? Having been brought up as a Catholic?

Mr. STEARNS. You are a Commissioner and you have looked at videos and you made a value judgment that this was not educational.

Ms. TRISTANI. No, the value judgment was that it did not serve the primarily educational requirement.

Mr. STEARNS. Let us keep your hat as Commissioner and I have just showed you a video of an individual and others who are advocating the use of the Ten Commandments to lead a life according to the principles thereof, would you as a Commissioner view that as educational, yes or no?

Ms. TRISTANI. I think I would have to see more of the program, of the video because it could be in different contexts.

Mr. STEARNS. Say we had a noncommercial educational channel providing teachings to the audience about collecting items, col-

lecting wrestling magazines or comic books, would you consider that educational or not?

Ms. TRISTANI. Collecting magazines or wrestling. I would again have to see more about the programming.

Mr. STEARNS. I could make it more ridiculous and say what about teaching the audience how to collect pet rocks. Is that educational?

Ms. TRISTANI. Pet what?

Mr. STEARNS. Pet rocks.

Ms. TRISTANI. I don't know what pet rocks are.

Mr. STEARNS. That is probably another aspect about this. If a person is going to make a decision on listening to a video or watching it, he or she has got to be some kind of culturally, educationally observer to even make a decision. So what I am trying to point out in this discussion is you are taking a bizarre position in which you as an individual can decide whether the collecting of pet rocks, wrestling and comic books, or people advocating the Ten Commandments as a way of life, you can't make that decision yourself this afternoon, so it is bizarre for you to come here—

Ms. TRISTANI. I said on the Ten Commandments I would have to see the full context of that. I think what we are struggling with here is that any standard is very hard. But we do have a standard that programming should be primarily educational. We have it, as Congressman Markey brought up in the children's television guidance.

Mr. STEARNS. You can't this afternoon tell me, out of the three programs I gave you, whether they are educational or not.

Ms. TRISTANI. I think I would have to see them. Again, we were giving guidance. If the questions came up and some question whether they are meeting—

Mr. STEARNS. I see you there. We have the program here, we have five programs and you are sitting there as the FCC czar of information and you say that program is no good, that program is educational and this program is educational and this program is not. Do you see how offensive that is?

Ms. TRISTANI. Sir, that is not how I see myself, as the czar of anything. That is for sure.

Mr. STEARNS. Mr. Wildmon, it is great to see you. I have been on your program. How many religious broadcasters are there?

Mr. GUSTAVSON. 1,730 radio stations, AM, FM, educational, commercial and about 245 television stations. By the way, 15 of them operate in that noncommercial educational band that are owned by christian organizations.

Mr. STEARNS. What is the average number of hours of programming a day, or week in some of these stations?

Mr. GUSTAVSON. Many of them are 24 hours a day.

Mr. STEARNS. And some are also less?

Mr. GUSTAVSON. Oh, yes. Some of them are daytime, AM stations and so on.

Mr. STEARNS. Do you think it is possible the FCC could quantify the difference between cultural and educational?

Mr. GUSTAVSON. It has occurred to me as I have been sitting here, operas, concerts, teachings on pets and animals and cooking shows, would all be considered educational in nature on a station

but not religion. In other words, they would qualify as being acceptable educational programming. It is very confusing to us.

Mr. STEARNS. My time is almost up. I would be glad to let Mr. Wildmon speak.

Mr. WILDMON. What I heard started this whole thing was they got some complaints from Pittsburgh from people there that Cornerstone was going to go over and it was supposed to be 50 percent educational and cultural. Is the programming supposed to be educational or cultural for all the people or all the viewers?

Mr. STEARNS. That is another problem with this because for me, collecting pet rocks would not be educational, cultural or meaningful but for some people in this country, it might.

Mr. WILDMON. What I heard said was that religion serves only a small group of people. That may not have been the exact words but that was the implication. Therefore, because you only serve a small group of people, we have to regulate your license and make sure you act like the government thinks you ought to act.

I would ask the question, I don't speak a lot of good English but I sure don't speak any Spanish. What about those stations that are 24-hour, noncommercial Spanish speaking stations, are they educational? Do you see the point? We are opening a can of worms here.

Mr. STEARNS. Anyone else?

Mr. DREISTADT. Just a couple of points I would like to speak to. In the application process, Cornerstone demonstrated meticulously that we had over 100 hours of qualified programming under the established standards. That was acknowledged in the decision of December 29. Under the Additional Guidance, we applied those standards to the same programming and reduced it down to about 30 hours per week, which was no longer able to allow us to qualify.

Our mission is to broadcast the gospel. That is something we do 24 hours a day, 7 days a week. To comply would have meant that we would have had to abandon our mission 49 percent of the time. There are already 15 other noncommercial television broadcasters who are already broadcasting christian programming, 15 applications have already been approved.

Because of the opposition, the complaints raised from the Pittsburgh groups, this application was singled out for special scrutiny that we believe was inappropriate. It is interesting to note that of all those complaints that were raised, my understanding is that none of those complaints were justified and all of them were dismissed.

So in spite of the fact there were complaints, none of them had any credibility. This whole decision, frankly, put us in a catch 22. We wonder if the FCC or members of the FCC did not understand that because they found themselves between a group that was protesting and a group that was applying. This decision would appear to get them off the hook because we were in a position they knew had to be untenable for religious broadcasters.

A final comment. I do find it offensive to be categorized in the same group of those who are evaluated for indecency and obscenity. Religious programming is the very moral fiber of our Nation and has no place to be compared to indecent and obscene programming.

Mr. STEARNS. Thank you, Mr. Chairman. I yield back.

Mr. TAUZIN. Thank you, Mr. Stearns.

The Chair recognizes the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. I apologize. I was at another illuminating meeting with Administrator Browner and the EPA, so I come from the fire into the frying pan here. I do appreciate those in attendance.

Mr. Dreistadt, you explained your testimony. You were starting to talk about it in the last part of Mr. Stearns' time. As a result of the national attention to this issue at the FCC, Cornerstone was forced to terminate the proposed transaction and the corresponding sale of the television and lose financial benefits of \$17.5 million in addition to over 3 years of time and resources dedicated to the project?

Mr. DREISTADT. Correct.

Mr. SHIMKUS. What effect do the witnesses think—this is for everyone—that this proceeding will have on religious broadcasters' speech operating on the FM band?

Mr. GUSTAVSON. That was what our members were afraid of, sir, that it would go then from the television reserved channels into the 88-92 on the FM band and we have hundreds of stations that use those frequencies.

Mr. SHIMKUS. Mr. Wildmon?

Mr. WILDMON. This was what disturbed me when I first learned of this. It would be bad enough saying we only have 16 televisions in the United States this would apply to. The standard would have been established. In my mind, the logic would have said the next step would be this same rule applies to the FM broadcaster.

You hate to accuse before it happens, but government has a way of taking an inch and an inch and an inch until the whole foot is gone.

Mr. SHIMKUS. To the Commission, you have stated that you fear that religious speech will be chilled based on this. Can you elaborate on that?

Mr. FURCHTGOTT-ROTH. Yes, you are exactly right. If someone has a message whether they are broadcasting it, whether they are speaking it, whether they are writing it, they will behave differently if they think there is someone in a government agency looking over their shoulder reviewing what they are saying and making decisions based on what they say.

It is beyond belief that it does not have a chilling effect to know that there is someone who is going to be reviewing a videotape of what you are broadcasting and deciding whether it falls into one category or another, and based on which category it falls into, whether your license is potentially going to be threatened with revocation. That is not the proper role of government.

Mr. SHIMKUS. I got in on the last part of Congressman Pickering's First Amendment emotions. Commissioner Tristani, do you agree with what you just heard as far as the chilling aspect on free speech?

Ms. TRISTANI. No, I don't because the first, as to FM radio or now vacated Additional Guidance, applied only to the noncommercial television reserve channels.

For the other, it applied to a very limited, as we have all heard, I think 14 or 15 stations. It did not say you cannot broadcast cer-

tain types of speech. It said that a certain amount of programming had to meet the educational requirement.

We have many religious broadcasters on commercial channels, we have a lot of non-religious broadcasts that occur even on the commercial channels. If you turn on the television on Sunday morning, you have broadcasts all over, so I don't see the chilling effect.

I don't see that government's role to go and review programming that occurs on the broadcasts. But we do do it in some circumstances. I brought up the indecency and obscenity regulations that we have as an example, not to compare in any way, shape or form this review but just as an example that we do look at tapes at times when citizens complain that there has been an indecent or obscene broadcast over the airwaves or the TV waves. So I brought that up as an example.

We have the childrens' television guidelines where we require 3 hours of childrens' television which is supposed to be primarily educational. This is another example where that comes up. We don't go out and review everything but if people complain or question a transfer of a license, we have to see whether it is arbitrary or unreasonable.

Mr. SHIMKUS. That is probably the reason why because many of us disagree with your evaluation of what happened. So we have two bills proposed of which I am a co-sponsor of each.

To the broadcasters, do you feel that either of these bills will provide sufficient protection from any further similar FCC action that may impede you from expressing yourselves over the air waves?

Mr. DREISTADT. I believe that both bills address the concerns that we, as broadcasters, would have about this area. Certainly H.R. 4201 is the more comprehensive and sweeping bill. That would be the one that, from a broadcasters' view point, we would like to see enacted because it would give us that safety.

When the language was vacated, I think it is important to note, there was considerable questioning and pressure for Cornerstone to reenter the transaction that we had terminated. It would appear to some that once the language was vacated, there was no reason not to move forward. However, as we read the decision, as we sought counsel on the decision, it became apparent to us that although the language was vacated, it was not disavowed. There was no change of principle or heart. In fact, we are seeing that to some degree today.

Because of that, without legal remedy, without legislative remedy, I believe it is a slippery slope for broadcasters who choose to use this noncommercial band for their mission.

Mr. GUSTAVSON. Yes, we would essentially feel the same way.

Mr. WILDMON. The same way.

Mr. SHIMKUS. I appreciate that. It has been an enlightening hearing and I will yield.

Mr. TAUZIN. For the record, Mr. Dreistadt, how long was the application upon which this guidance was issued pending?

Mr. DREISTADT. It was in excess of 3 years.

Mr. TAUZIN. I was around for a long, long time?

Mr. DREISTADT. We felt like it was forever.

Mr. TAUZIN. The letters the FCC received were urging action on the application?

Mr. DREISTADT. Correct. Our understanding was the letter did not suggest one solution or the other but just finally——

Mr. TAUZIN. Is that correct, Ms. Tristani?

Ms. TRISTANI. As I recall, no letter suggested any solution.

Mr. TAUZIN. But it asked to do something about it?

Ms. TRISTANI. One letter actually said act by December 15.

Mr. TAUZIN. In fact, we have some legislation pending that is going to tell the Commission to act on a certain date every time?

Ms. TRISTANI. yes.

Mr. TAUZIN. So that is all the letters you got from Members of Congress.

Ms. TRISTANI. I am saying as a result of that, we voted it when we did.

Mr. TAUZIN. The gentleman yields?

Mr. SHIMKUS. I will finish up by saying 3 years is a terminally long period of time. I am in my fourth year as a Member of Congress. I have already been through one election by the time you made a decision on this hearing. I think if members can seek re-election and go out before the voters. That will address the entire FCC restructuring issue that eventually we will get to.

With that, I will yield back.

Mr. TAUZIN. The Chair would like to make a series of unanimous requests.

First of all, the letters referred to by Mr. Oxley, by myself, to the Commission in response to its decision be made a part of the record. Without objection, so ordered.

Second, the Chair would like to submit for the record a defense of the Pickering legislation on the establishment clause question which has been prepared by staff. Without objection, that will be a part of the record.

[The information referred to follows:]

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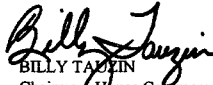
The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W., Room 8B-201H
Washington, D.C. 20554

Dear Chairman Kennard:

I am writing to express my deep concern over the so-called "additional guidance" provided to religious non-commercial educational TV operators in connection with the WOED proceeding. Frankly, I do not understand how the new policy can possibly be squared with our nation's traditional commitment to freedom of religious expression.

To better understand these new guidelines, I am asking you, as well as each FCC Commissioner, to respond individually to the questions set forth in the attachment to this letter. I would greatly appreciate receiving your these responses prior to the close of business on Friday, February 4th. Thanks for your cooperation.

Sincerely,


BILLY TAUZIN
Chairman, House Commerce
Subcommittee on Telecommunications,
Trade, and Consumer Protection

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani
Steve Lerman
Barbara Gardner
Elliot S. Davis
Joseph L. Luciana
John Feore
Professor Angela J. Campbell

Attachment

**Questions Concerning the FCC's "Additional Guidance"
for Religious Non-Commercial Educational TV Stations**

1. What is the basis for the FCC's conclusion that worship services generally do not serve the educational/cultural needs of the community?
2. Elements that are included in worship services typically include scripture readings, expository preaching (i.e., an examination of the meaning of particular scripture passages), discussion of the application of Biblical principles in the lives of believers, and religious music. Please explain why, in your view, these elements do not contribute to the educational/cultural needs of the public?
3. Isn't it unreasonable and excessively restrictive for the Commission to suggest that a worship service would qualify only "where it is part of an historic event, such as the funeral of a national leader . . . "?
4. Does the Commission really take the position that some sermons are educational and that some are not, "depending on their context," and that it will decide which are acceptable?
5. What special training do FCC officials possess to suggest that they are qualified to determine which sermons would qualify, and which wouldn't?
6. Commissioner Ness concedes that "distinguishing primarily religious programs from general educational programs [as required by the new policy] does not appear to be an instance where 'the ordinary person exercising ordinary common sense can sufficiently understand and comply . . . without sacrificing the public interest.'" How can the FCC justify the imposition of a regulation that can't be implemented by a person of ordinary intelligence applying his or her common sense?
7. What is the basis for the FCC's apparent conclusion that religious music -- ranging from classical (e.g., the Messiah) to gospel (e.g., Amazing Grace) -- is not an integral and extremely important aspect of our culture?
8. How can the FCC justify a conclusion that such music might qualify if played in the Kennedy Center, but not in a church?
9. What is the basis for the FCC's assertion that programming cannot serve the educational/cultural needs of the public if it is primarily devoted to "statements of personally held religious views and beliefs"?
10. Doesn't this policy effectively read religion out of the culture? That is to say, doesn't it necessarily reflect a government-established culture of disbelief in religious teachings?
11. If one were to accept the truth of religious teachings (e.g., that the scriptures reflect our Creator's position on how to lead a moral life), how could it possibly be concluded that this information is less important to the cultural and educational needs of the public than, for example, a cooking class on how to prepare creme brulee?

12. Doesn't the FCC's rejection of "exhortation" and "proselytizing" necessarily reflect a bias against religious forms of expression? For example, does the agency similarly forbid expressions of passion and enthusiasm with respect to secular educational/cultural presentations -- e.g., programs dealing with the visual and performing arts?
13. Isn't it also discriminatory to reject presentations of religious belief as not being "responsive to the overall public" when it is known that such presentations are appreciated by many more Americans than are attracted to some other forms of educational/cultural expression -- e.g., opera and other "classical" arts?
14. Please define what percentage of the population must be interested in a matter before you will consider a program as serving the "educational and cultural needs of the entire community" to which a licensee is assigned?
15. Doesn't religion have a role to play in "examining and solving the social and economic problems of American life today," a charge that the FCC admits Congress has given to non-commercial educational service?
16. Please explain the basis for the FCC's assumption of an "apparent dichotomy between religion on the one hand and science and technology on the other." Don't a myriad (and a growing number) of scientists believe that the scientific and religious viewpoints are increasingly converging?
17. Why does the FCC consider a program to be "cultural" or "educational" if it concerns the physical and mental -- but not the spiritual -- benefits of religion? Doesn't that policy reflect a materialistic perspective?
18. Taken as a whole, don't the new FCC's policies necessarily reflect that a disturbing anti-religious bias is at work within the agency?
19. Please explain what necessitated departing from the previous policy of giving broadcasters discretion to conclude whether a particular religious program serves valid educational/cultural needs?
20. Does this constitute a "compelling" public interest justification for the FCC's shift in position? If so, please explain. If not, please advise me how the new regulations can be squared with the Religious Freedom Restoration Act?
21. Do you believe that it would be reasonable for a broadcaster to conclude that worship services, and programs featuring scripture readings, sermons, religious music, and/or personal expressions of faith serve the educational/cultural needs of the public? If not, please explain why.
22. Please explain how your position is consistent with the free exercise clause of the First Amendment to the United States Constitution, and particularly with the Supreme Court's decision in Rosenberger v. University of Virginia, 515 U.S. 819 (1995)?
23. Please explain how the FCC's administration of such a policy would not inevitably involve it in impermissible content and viewpoint based judgments, in conflict with CBS v. DNC, among other cases?
24. Please explain how the FCC's new policy, which mandates a specific numerical goal for certain programming, is consistent with Turner II, which found that the must-carry rules were constitutional given the lack of a quantified requirement?

25. How is the FCC's exclusion of programming featuring proselytizing, exhortation and statements of personal belief consistent with the nation's commitment to "uninhibited, robust, wide-open" debate, identified by the Supreme Court in New York Times v. Sullivan, 376 U.S. 254, 270 (1964), as a goal of the First Amendment?
26. Do you consider the FCC's 50% standard and definition of what does and doesn't constitute "educational, cultural and instructional" programming to be an "incidental" restriction or speech? If so, why? Please harmonize this view with existing Supreme Court caselaw on the issue?
27. Please explain why you think it was appropriate to issue this policy without following the normal APA procedure of public notice and comment? Do you believe that the FCC would not benefit from the public's perspective on this matter?
28. Please explain the circumstances under which public notice and comment are appropriate?
29. Please explain why the FCC released this decision during the week between Christmas and New Years, while Congress was out of session, when it had been pending for years?
30. Why has the FCC singled out religious programming as the object of "additional guidance"? On the FCC's theory, don't non-commercial educational broadcasters also need guidance as to what secular non-commercial programming is and isn't "cultural"?
31. Please explain whether a program of secular music would be "cultural" -- and would it matter if the music was classical, rock, jazz, or rap?
32. In your view, is a program disqualified from being considered to be responsive to public needs simply because it suggested that a particular religious viewpoint provided the exclusive path to salvation?
33. How would you expect the millions of Americans who regularly attend church and synagogue to react to the agency's conclusions in this proceeding?

Parameters of the Establishment Clause:

The First Amendment states:

"Congress shall make no law respecting an establishment of religion"

In case law dating back to the 1940s, the Supreme Court has held that the Establishment Clause, among other things, has come to mean that government cannot pass laws that favor religious belief over non-belief.

In order to withstand a challenge under the Establishment Clause then, a statute must:

1. have a secular legislative purpose,
2. have a principal or primary effect that neither advances nor inhibits religion, and
3. the statute must not foster an excessive government entanglement with religion.

Application of the Establishment Clause to H.R. 4201:

On pages 3 and 4, H.R. 4201 states:

"The Commission shall not prevent religious programming, including religious services, from being determined by an organization or entity to serve an educational, instructional, or cultural purpose.

A. H.R. 4201 has a Secular Purpose

Even though this provision deals with religious programming, H.R. 4201 still has a secular purpose-- that is, the bill still has a purpose that is not overtly or specifically religious in nature. The intent of this provision is not to specifically or overtly give religious messages preferential treatment-- not at all! To the contrary, this provision is intended to ensure that ALL NONCOMMERCIAL PROGRAMMING, including the traditional religious programming that has been broadcast over noncommercial airwaves for years, is uniformly regulated by the FCC. The FCC should not be allowed to once again target, or discriminate against, one type of noncommercial programming, such as religious programming, while doing nothing at all to restrict other noncommercial programming.

In the end then, this provision requires regulatory parity between all types of noncommercial programming, and therefore, cannot be construed to overtly bolster religious programming. As our own Legislative Counsel, Steve Cope, Commissioner Furtchgott-Roth, and the United States Supreme Court, in *Rosenberger v. University of Virginia*, have acknowledged, "allowing (one) group to speak on the same basis as (all groups) to avoid a (content-based) First Amendment violation, does not, in turn, violate the Establishment Clause. There is simply no Establishment Clause violation in . . . honoring . . . duties under the Free Speech Clause."

In 4201, all we have done is ensured that religious groups are able to speak on the same basis as other groups, nothing more.

B. H.R. 4201 neither advances nor inhibits religion

Because the bill requires that all noncommercial programming be treated the same, it cannot be construed to either advance or disadvantage religion.

C. H.R. 4201 does not entangle the Government with Religion

There is absolutely nothing in this bill that directs any governmental entity to provide support or substantial aid, whether it be financial or other, for or to any religious entity, cause, or service. This bill does not require that a government pay teacher salaries at parochial schools, or that government fund the construction of a church or bible college. All this bill does is essentially tells the FCC that it cannot tell a noncommercial broadcaster that religious programming does not serve an educational, instructional, or cultural purpose.

Mr. TAUZIN. The gentleman from Massachusetts has already requested the record remain open for 2 weeks, so members will be able to submit any additional information or witnesses may do so within the next 2 weeks.

The Chair would yield to my friend, Mr. Markey.

Mr. MARKEY. You are doing a great job defending your position, Commissioner.

First of all, I would like to clarify that Commissioner Tristani, as I heard it, did not compare obscenity to religious broadcasting. She was asked the very narrow question of whether or not she reviewed a video. In answer to the question, she just said that she did do it in those other categories, not making any comparison whatsoever to equate religion to obscenity. I don't think that is fair to in any way impute that to her. I consider that to be way over the line because it is quite clear that is not what she was doing.

Here is my problem as I look at this issue. If I live in a christian community, a small town, there is only one noncommercial educational station. In my community, I went to Catholic schools every day from age 6 to 26, never stepped a foot in a noncatholic school. I live in a christian community and there is only one noncommercial education station in my community, 4 or 5 stations, that is it and one dedicated for that purpose.

Someone purchases that station, gains access to it for whatever reason. That religion that is now represented by the ownership of that station is not christian, and all they broadcast all day long are the tenets of that religion, proselytize that religion, going into that community. Is that educational? Is that what we want the only noncommercial educational channel in town to be used for? What do we say to that community when someone buys that station?

We are getting into some very thorny questions here in terms of the identity of a community when individuals are religious with lots of money and want to buy stations in communities that might not in any way represent the tenets of that religion. Would the community begin to feel that station has now been taken over and is not reflective of the balance of views in that community?

How do we deal with that issue, Commissioner Tristani? How is this something that we would deal with if that should so occur under the proposals that are being propounded by opponents of your position on this issue?

Ms. TRISTANI. Under the proposals, my understanding is you wouldn't be able to deal with that issue.

Mr. MARKEY. In other words, we would wind up with a station owned by someone who had a religion that was a complete minority, that is 1 percent of the population being able to broadcast all day long, one religion on the only noncommercial educational station in town?

Ms. TRISTANI. You could.

Mr. MARKEY. As a Catholic, I would just have to watch that TV station all day long as one of only four or five in town and have no way of influencing them to put on a broader spectrum of views under this particular legislation, is that correct? Is that your interpretation?

Ms. TRISTANI. That could happen, yes.

Mr. MARKEY. That could happen. I think these are very thorny questions, these are very difficult questions, very difficult. I know the reason I was sent to Catholic schools for 20 years was that religion wasn't taught in public schools because that is in the Constitution, we keep it separate. My religion is over here and the public schools are over here and there is a Jewish temple.

As I am asked now to cross this divide, it raises very real questions in my mind to be honest with you in terms of peoples' right not only to speak but also their right not to hear if they don't want to, especially on stations that are reserved for educational purposes. If a station begins to proselytize a religion that I don't happen to subscribe to, and that is the only noncommercial educational station in town, then I think without question there are going to be some who are going to be offended by that, especially if there was an ability for that religion to purchase another station that was reserve for that purpose, for religion.

So if we are going to break down this barrier, that is a big moment. I think we would probably be better off discussing some way in which we could put religious broadcasting into a completely different category so that all faiths could then compete for stations reserved for that purpose. To take the noncommercial educational area and begin to try to draw lines, the questions that are being posed to the Commissioner are thorny ones but a similar set of questions can come right back at the other side once they decide they are going to break new constitutional ground in terms of what could be allowed by one minority religion in a community dominated by another religion.

I want to give you a little time, Commissioner, to comment on what I just said.

Ms. TRISTANI. I think you raised very legitimate concerns and it not only applies in your hypothetical where the community where you grew up was all Catholic. What if it was 80 percent Catholic and 10 percent Jewish, 5 percent Baptist, 3 percent Islamic?

Mr. MARKEY. That was my community in fact. That is the exact community I grew up in.

Ms. TRISTANI. You have a Methodist station. It is not only the majority that may be offended by the fact that the one reserve channel is just Methodist. But the Jewish community, the others I mentioned could be offended. You can come up with a lot of hypotheticals.

Mr. MARKEY. Thank you, Mr. Chairman.

The Chair recognizes himself briefly. Let me, on the contrary, talk about the thorny question that is raised when the agency of our government decides to begin deciding what is acceptable educational, cultural programming as it relates to religious broadcasting.

What is so thorny about that, Madam Commissioner, is that when the Commission decides, as a matter of enforceable law, it will determine whether a person keeps a license or not, the church services generally will not qualify as general educational programming. The Commission, by setting a numerical standard, 50 percent plus 1, of qualifying programming, in effect limits the religious programming that might be conducted on a station.

In effect, our government begins limiting the expression of religious content in our society. I may be offended, as one of the witnesses said, when one of those stations in my community is an all foreign language station that I don't speak, I might like it when it is French or Cajun, I might like it better when it is a Cajun Catholic the way I was raised, but I could be offended if it was all Spanish as well.

The thorniest problem for us not whether we might be offended because we can't understand or we don't agree with the tenets being expressed in that programming, to me the real thorny problem is when government begins deciding what is and what is not culturally attractive and educational to me in religious programming.

The question Mr. Stearns asked was interesting, whether a program that admonished me to live by the Ten Commandments would or would not be considered by any one of you to be educational. Suppose I didn't know the Ten Commandments and it would be very educational, or as if I didn't know what pet rocks were, it would be somewhat educational for me to learn what they were. I don't know that any government agent or government institution can make that distinction.

As I read the retraction of the Commission of its guidance, it says, "We vacate this Additional Guidance and we defer instead to the educational judgment of the licensee unless such judgment is arbitrary or unreasonable," in effect returning to an age old policy, that correctly decided not to try to define with clear definitional parameters what was or was not educational about religious programming.

I agree with my colleagues, that is the most slippery slope I think our government could ever find itself on. I think the Commis-

sion found itself there and quickly retreated. I frankly am glad the Commission was assaulted by so many who found it offensive because I think our government needs to stay out of that.

One of my colleagues talked about the need for an FCC in general. I want to make a case here. The First Amendment respects freedom of speech in our society. It is so sacred that our founding fathers wrote it into the First Amendment. They didn't mention anything about the free right to truck in America but we deregulated trucking. We even abolished the agency which used to regulate trucking, the ICC. For some reason, we have maintained in our society an agency to regulate free speech.

We ought to always think about why we did that and why we need that. We always ought to think about when it exceeds whatever minimal authority it ought to have in an area so sacred as free speech.

When it begins, as an agency of government, to define what is not exceptional speech, when it comes to religious broadcasting and whether or not a church service qualifies under a quantifiable percentage, under some judgments made by bureaucrats, not even elected by the people of this country, I think we have gone much too far.

I have submitted to the record a statement prepared by staff defending the sanctity of the Pickering bill. It defends it on the three grounds established by the Supreme Court, that the bill must have a secular legislative purpose. This bill does. It simply says the Commission shall not prevent religious programming, including religious services from being determined and it covers all noncommercial programming.

It is not intended specifically to overtly give religious message preferential treatment. It simply says don't discriminate against them. That is consistent with the Constitution. It requires all noncommercial programming be treated the same. That is consistent with the Constitution. It neither advances, advantages nor disadvantages religion. It doesn't entangle the government with religion as the action by the Commission almost did, I think. I think it is far preferable.

The Chair wishes to publicly thank Mr. Oxley for his effort at addressing this in legislative form as rapidly as he and my colleagues who joined him did. The Chair wishes to thank Mr. Pickering for working with the Chair and his staff, and the staff of our committee for improving upon the original draft so that it covers not only television but radio licenses, and so that it not only prohibits the FCC from doing what it attempted to do without a rule and comment but prohibits them from doing it again, in fact insisting upon the longstanding rule of the Commission to defer to the judgment of the licensees in regard to what is and is not educational about religious programming.

I commend this bill to the members of the committee and as soon as we return after Easter recess, we intend to come together and mark up this bill and move it on to the full committee.

The Chair will yield to Mr. Oxley.

Mr. OXLEY. Briefly, this whole issue is really about reestablishing congressional intent as it relates to whether in fact any government agency can control or direct content as relates to broad-

casting. Stripped down that is what this issue is about, that is why we were able to secure so many co-sponsors so quickly and so easily on this legislation because it really does get at the heart of the issue as to whether the government can determine content under the First Amendment protections afforded.

The gentleman from Massachusetts mentioned these are difficult questions and that is true but I think this is clear. This issue is clear that before the FCC, not an elected, independent agency makes a determination that goes well beyond the issue of swapping licenses and really gets at the heart of what broadcasters, in this case, religious broadcasters, can or cannot establish as religious broadcasting given educational content and the like, this issue gets down to whether those kinds of fundamental decisions should not be made over the holidays or whenever but in fact, made in a standard rulemaking procedure where by the public has an opportunity as they do in virtually all of these kinds of matters that are of fundamental importance to have public input. That is why we specifically put that in that bill to make certain that was recognized.

It seems to me that is about as democratic as we can make it. I would daresay that there aren't too many people who have followed this issue that would indicate or would think that given the circumstances to do over again and having a hearing like this that would change fundamental policy out in the open in a rulemaking procedure where the public could have input, there is absolutely no way you would have the same result as you had the first time. Absolutely not.

The vote to rescind the Order, I would indicate is clearly an example of that. The majority of the FCC Commissioners, with the exception of Ms. Tristani, recognized the error of their ways, recognized those decisions were far more important to everyone to be determined in a closed hearing without public comment. That really reflected reality.

Our bill basically says you can't do that again, you can't control content or attempt to control content in those kinds of decisions. I am sure the gentleman from Pittsburgh had to be shocked at the way the entire issue unfolded. He thought everything was up to normal, that the swap would take place and he wouldn't have to be subjected to these kinds of decisions by the FCC.

That will never happen again, I guarantee you. We will pass this bill, we will reestablish congressional intent, we will make it very clear to the FCC and anybody else that is listening, that we are the elected representatives of the people. I don't say this in an arrogant way, but we are people who are responsive, who are elected, who are accountable to our constituents.

With all due respect, Ms. Tristani, that distortion and demagoguery talked about was really about freedom, about democracy, about speaking one's mind. That is the essence of our system as long as all of us live and far beyond that. We are going to make certain by passing this legislation that those kinds of activities don't take place again.

I thank the Chair for his leadership on this issue.

Mr. TAUZIN. I thank the gentleman.

Mr. Pickering?

Mr. PICKERING. Let me just add that the gentleman from Massachusetts raised the complexity of these issues and I agree, they are complex, but I think this case embodies probably best what Steven Carter described in his book "The Culture of Disbelief," where we have a group that not only wanted to bring balance in the establishment clause but they actually wanted to ban the religious voice from the public square or the public airwaves.

It is not only a position of neutrality but a position of hostility and discrimination and bias against the religious. That is why I think we have to take the action in the legislation so that we can make sure that does not happen.

Let me just say to the gentleman from Massachusetts, if you look at when the Constitution was written, we didn't have public schools. Our educational institutions, the great educational institution of Harvard was a religious institution founded by religious people to instruct, to teach, to bring culture and to get to the point where we are today in history to say that the religious voice is not educational, it's not instructional, it is not cultural. That is a very disturbing and sad place to be but some take that view, that somehow they are mutually exclusive, you cannot be both religious and educational or instructional or and cultural.

I just do not believe we should separate our history and our heritage by having the types of decisions the FCC originally proposed and then rightfully rescinded.

I look forward to working with the Chairman, Mr. Oxley and the other members of this committee. I want to assure the gentleman from Massachusetts that we did not intend or do not intend to do anything that would harm children's broadcasting. I would be glad to work with you on that.

Thank you.

Mr. TAUZIN. Mr. Markey?

Mr. MARKEY. I thank the gentleman from Mississippi because I know there is a legitimate debate that has raged in this country for 213 years over this subject. It is one that we will be debating for the next 213 years as well. It is not an easy one to resolve but at the same time, it is not one that has all truth on one side which I think is really one of the tenets of the legislation.

When I went to Catholic school, I was educated in the history of the United States and the world. I am sure those of other religions would be shocked at the roles the Catholics played in every key part of the history of the world and the United States.

It is completely appropriate for Catholics to have their education laced with these religious overtones. It is both. I was learning, they were teaching, it was educational, but I am not so sure the Jews or Methodists or an Islamic parent would feel comfortable listing to the role.

I learned more about Roger B. Tauney being the first Catholic Supreme Court Chief Justice than I did about what the impact of the Dred Scott decision was made by Roger B. Tauney. That is fine, that is the right. If you are going to teach, be educational and link it with religion, you get that result. It is an absolutely appropriate result in a Catholic school, in a christian school, in a Jewish school, in an Islamic school. Every parent has every right to put their child into a school that is going to lace education and religion together.

All I am saying is that if the only noncommercial educational station in town is owned by one religion and they are lacing education and religion together that way, and it is the minority religion in town, it is going to cause real problems in that town. If we take the language, which is in the legislation being proposed, it changes the definition under which licenses are granted from nonprofit educational organizations to the words "nonprofit organization or entity" and leaves out the word education.

We are not only going to open it up to the good but we are going to open it up to the scam artists as well. There won't be any standards, there won't be any requirements and we will enter a whole new world where education itself may not be predominant. It is just nonprofit and that is very dangerous.

In addition, the impact which the legislation has upon the Children's Television Act, which was no simple thing to get put on the books just to get these commercial broadcasts put on 3 hours a week, there are significant issues that are raised.

So I am very cognizant of the fact these stations don't have to go to auction, that the noncommercial stations are exempt, that there are real risk that sham or scam artists can use the new definition to take over the only noncommercial educational station in scores of communities across the country, and I am also afraid of what the potential is for proselytizing by religions that more properly belong in a religious educational setting or in a church or synagogue.

I think we have to be very careful if we go down this line of invoking the alarm and its intended consequences. I think this was a very good hearing. I am glad the issues have been aired and I look forward to any activity on it.

Mr. TAUZIN. Let me say that I think the gentleman is perhaps wrong when he alleges that because something I hear is disturbing to me or that I don't agree with, that it is not educational or cultural.

I used to disagree with my professors vehemently, got in big trouble for it occasionally. They taught me things I thought were wrong, challenged them on it, and sometimes came out good and sometimes didn't.

I went to Catholic school too, Mr. Markey. I remember in my confirmation lessons in the little Catholic church, I got into an argument with my parish priest because he was trying to tell me that the only way a person could get to heaven was by becoming a Catholic. I thought that was rather strange. I thought there were a lot of people who might not be Catholic who followed their faith and maybe some people who didn't learn about a faith but who had lived a good life. I couldn't imagine God saying, you are not entitled to share eternity with us because you didn't join my religion. I almost didn't get confirmed.

Because I don't understand a Spanish broadcast station because I have not learned Spanish and I should, my mother is a Martinez and I should learn but because I don't understand it doesn't mean it is not educational. Because some in my district might understand it and enjoy it and be educated from it, does that qualify it as one of the witnesses said when all the people in my district are not Spanish-speaking.

The problem I have, and it is difficult to get into all this and this has been a difficult hearing although a good one, is again the very difficult problem we have when we try to define the parameters of what is cultural and what is educational when it comes to religious teachings and church services, music and all the things that are part of the cultural, social religious life as it is broadcast over a station.

I think we are always safer by not trying to get into it and trying to define it as a government. I think that is what our forefathers meant when they told us to separate, told us to do our business. I believe Christ had it right when he said, "Render to Caesar the things that are Caesar's, and things that are God's to God." I think that basically ought to be the thing that decides it for us. Keep our hands off trying to define this stuff. That ought to be for the people of our country and the religious broadcasters to do, withholding always to the Commission's prerogative if in fact some scam artist should clearly, unquestionably as a standard has always existed, unreasonably, interpret that right to use those stations in a way that does operate as a sham.

Mr. MARKEY. Would you yield?

Mr. TAUZIN. Yes. I would be glad to yield.

Mr. MARKEY. Again, you get into this area where Mr. Furchtgott-Roth and Ms. Tristani would have to look at the films to see what is unreasonable under that test as well.

Mr. TAUZIN. That has always been the law.

Mr. MARKEY. Mr. Furchtgott-Roth doesn't feel comfortable at any time looking at film, it is chilling to him to have to look at it.

I will be blunt about it, I don't want Bob Jones University buying the only noncommercial educational station in my hometown and telling me that Catholics are a cult, telling me that the Pope is the emissary of Satan.

Mr. TAUZIN. I think he called him an Antichrist which I found offensive too.

Mr. MARKEY. I don't like it but because Bob Jones has the money to buy a station and to come to my hometown and that is the only station in town and I am going to have to listen to this message although it is laced with the history of our role in society and a little bit else about their university, that may satisfy the test to some but I don't want that.

I don't think it is unreasonable for people to be apprehensive of that guy coming to our town.

Mr. TAUZIN. Here is the problem, if all of us in government starting regulating speech in our society based upon what we like to hear or what we agree with, we are in deep trouble. I don't like Bob Jones calling my Pope, the head of my church, the Antichrist. I think he is wrong to do that and I would love it if he would apologize instead of going on Larry King and admitting he said that or that he continues to believe that. I am troubled by that. I think people of faith ought to be a lot more tolerant than that. We ought not do that. I am offended by that too.

The fact that speech offends me does not give me the right to regulate it or limit it the way I think this order attempted to do. That is what I found so offensive.

Mr. PICKERING. My understanding of the current practice and the history of these noncommercial licenses and those who happen to be religious in mission is that we do not have examples of abuses or shams in the past or in the present. Our proposed legislation does not change the practice of the FCC in granting or transferring these licenses in any shape or form. The definition will not change the practice in any way. Let that be clear. This has nothing to do with Bob Jones or any other fringe group. This is simply about whether the FCC can regulate the content of programming and we say it cannot. It cannot do what it attempted to do earlier by favoring or endorsing or opposing, in the words of Justice O'Connor, one religious speech over another.

So our bill does not change current practice, it will not result in any sham group or any fringe group of getting something they do not have today. The definition is taken from the IRS Code which includes educational and nonprofit and religious. That is the only change and that would not affect who is eligible yesterday, today or tomorrow.

The gentleman from Massachusetts proposed earlier having a separate category for religious broadcasters, a segregation of the religious, this is too hard, this is too complex—we just really don't like those people, let us put them over here where their voice isn't heard or doesn't intrude upon us. I think that is the heart of this question, a question of bias and discrimination against the religious voice.

We did not change today's practice or yesterday's practice, we simply say the FCC cannot regulate content.

Mr. TAUZIN. Thank the gentleman.

Let me thank the witnesses. Ms. Tristani, we obviously have a difference of opinion and that is part of what America is all about too. That is part of what I guess we are trying to protect, the right to have a different opinion and different religions, different expressions and not for me to shut you down or you to shut me down in any way. Thank you for coming and for expressing your opinion, albeit one we disagreed with.

Commissioner Furchtgott-Roth, we always thank you for coming back to what we consider part of your home here at the Commerce Committee.

Gentlemen, we also thank you for educating us and adding some culture to this committee.

The committee stands adjourned.

[Whereupon, at 3:24 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]



Executive Director
Jerold M. Starr
Associate Director
Karen L. Conner
Outreach Coordinator
Alex Traugott

BOARD OF DIRECTORS
Nolan Bowie
Harvard University

Daniel del Solar
Producer

George Gerbner
Temple University

Janine Jackson
Fairness & Accuracy
in Reporting

Nicholas Johnson
Former FCC Commissioner

Alvin H. Perlmutter
Sunrise Media LLC

Jerold M. Starr
West Virginia University

Barbara Trent
Empowerment Project

April 13, 2000

Linda Bloss-Baum
House Commerce Committee
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Washington, DC 20515

Jerold M. Starr
Citizens for Independent Public Broadcasting
1029 Vermont Avenue, NW
Suite 800
Washington, DC 20005

Testimony for the Record

RE: Subcommittee on Telecommunications, Trade, and Consumer Protection April 13, 2000 hearing on H.R. 3525, The Religious Broadcasting Freedom Act and H.R. 4201, the Noncommercial Broadcasting Freedom of Expression Act of 2000

Dear Representatives,

I am the coordinator of the Coalition to Defend Educational Television. The Coalition expects to show evidence of substantial opposition from educators and people of faith to H.R. 3525, the so-called "Religious Broadcasting Freedom Act." This resolution has nothing to do with religious freedom. Instead, it seeks to deprive the FCC of all discretion to properly defend the public interest in channel assignments, essentially removing all eligibility requirements for noncommercial educational (NCE) licenses. This resolution neglects the needs of the whole community for the wants of a strident religious minority.

Coalition member Ralph G. Neas, President of People for the American Way, emphasizes that religious broadcasters are "asking for special privileges and claiming that failure to grant them is discrimination." The first amendment does not guarantee broadcasters the right to a reserved channel and protecting the integrity of educational channels does not constitute discrimination against religious broadcasters. This resolution is a dangerous assault on channels that are essential to the democratic process by a powerful lobby seeking to promote its sectarian interests. It must not stand.

The Coalition submits the following enclosed documents:

- Press release from February 16, 2000, describing the Coalition, its goals and member organizations;
- Earlier press release from January 20, 2000, regarding the Coalition with statements from leaders of member organizations;
- Coalition action alert informing members of the pending H.R. 3525 and Senate Bill S.2010 and asking they contact and request their Congressional representatives oppose both pieces of legislation;
- Background statement that exposes the hypocrisy of this resolution; and

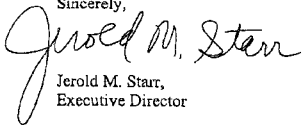
1025 Vermont Avenue, NW| Suite 800| Washington, DC 20005| VOICE: 202-638-6880| FAX: 202-638-6885| EMAIL: cipb@cais.com
www.cipbonline.org



- Timetable of events giving the history of the Pittsburgh case and the emergence of H.R. 3525 at issue today.

The still growing Coalition includes educational groups like the National Education Association, Center for Media Education, People for the American Way, Benton Foundation, Political Research Associates and National Writers Union and religious groups like the National Council of Churches, the Interfaith Alliance and Unitarian Universalists.

Sincerely,

A handwritten signature in black ink, reading "Jerold M. Starr". The signature is written in a cursive style with a large, looping initial "J".

Jerold M. Starr,
Executive Director

Linda Bloss-Baum
House Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

Jerold M. Starr, Ph.D.
Executive Director
Citizens for Independent Public Broadcasting
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Also:
Co-Chair, Save Pittsburgh Public television Campaign

Testimony for the Record

RE: Subcommittee on telecommunications, Trade, and Consumer Protection April 13, 2000 hearing on H.R. 3525, The Religious Broadcasting Freedom Act and H.R. 4201, the Noncommercial Broadcasting Freedom of Expression Act of 2000.

Dear Representatives,

I am writing to you as the Co-Chair of the Save Pittsburgh Public Television Campaign (SPPTV). We are the community group that formally opposed the license transfer of Cornerstone's WPCB-TV for WQED-TV Pittsburgh's WQEX-TV and subsequent transfer of WPCB-TV to Paxson Communications for \$35 million, the proceeds to be split evenly between Cornerstone and WQED. This is the case that has launched this bill.

This case also achieved national attention with disclosure of Senator John McCain's letters to the FCC on behalf of Paxson Communications to resolve these applications by December 15, 1999. The case received national attention again in January with debate over language in the decision clarifying the FCC's eligibility guidelines for reserved, noncommercial educational licenses.

Although the Commission, responding to intense political pressure, subsequently rescinded those clarifications, this bill already had been filed. According to its authors and supporters, the bill was still being promoted to "ensure the precepts underlying the Additional Guidance do not otherwise influence the FCC application process approval process." In fact, NRB President Brandt Gustavson called the FCC's unprecedented voiding of its own language before expiration of the deadline for reconsideration as "a total victory" and then declared, "The war continues."

I have been a leader in the struggle to democratize the programming and governance of WQED-TV since 1993. I did not become actively concerned with Cornerstone until 1996 when their complicated and well concealed transactions with WQED-TV threatened to

deprive Pittsburgh of WQEX-TV, at the time the third most popular second public television station in the country.

Our FCC opposition was represented by the Institute for Public Representation of the Georgetown University Law Center. I gathered and submitted substantial evidence for most petitions filed. I also am Professor of Sociology at West Virginia University, an experienced field researcher and author of many books. In fact, I have written a book about this case, scheduled to be published by Beacon Press at the end of April. It is called *Air Wars: The Fight to Reclaim Public Broadcasting*.

As a result of these activities, I was invited to serve as first Executive Director of Citizens for Independent Public Broadcasting (CIPB), a national organization dedicated to strengthening and democratizing the US public broadcasting service. An important part of our mission is to protect noncommercial educational channel assignments for their intended purpose, to provide "educational programming" for the "whole community."

When we heard that this bill was being filed, CIPB organized the Coalition to Defend Educational Television. Participating organizations have provided statements for the record and put action alerts on their web sites for members to write to Congress to oppose this bill as well as the Brownback bill in the Senate.

At this writing, the Coalition includes the National Education Association, Center for Media Education, People for the American Way, Benton Foundation, Political research Associates, National Writers Union, National Council of Churches, Interfaith Alliance, and Unitarian Universalists. The composition of this coalition makes clear our position: we seek to defend education, not discriminate against religion.

If as the National Religious Broadcasters declare, this is a war, well we might ask who are the combatants and what are the stakes. NRB is a self-described "Association of Christian Communicators." For starters they represent only those religions that consider themselves Christian. Even among Christians, however, they are a small minority. Worse, they are a minority that is intolerant of other religions.

For two years, a group of Pittsburgh residents video taped, transcribed and reported on the content of Cornerstone Programs. Here is a sampling of comments witnessed on other religions:

- In Bob Anderson's *Exposing the Lie* we are told that unless you're born again, you aren't really Christian: "It doesn't matter what the name is on the door...whether it's Methodist, Baptist, or Episcopalian or Lutheran or Congregational...that doesn't make a person a Christian." According to Anderson, Unitarianism is a "cult" and Church of the Latter Day Saints (Mormons) "promotes divorce, teenage pregnancy and venereal disease."
- Pat Robertson has both the *700 Club* and *CBN News* on Cornerstone. Robertson's New World Order thesis holds that most wars and other horrors have been caused by Jewish international bankers and a secret religious society called the Illuminati.

The (Jewish) Anti-Defamation League has denounced Robertson's book as anti-Jewish "kookery" that should be a national issue. Cornerstone has repeated programs featuring this theme in *The Money Masters* and *Global Bondage*.

- On the *700 Club*, Robertson is recorded to have referred to other faiths—like Episcopalians, Presbyterians and Methodists—as having “the spirit of the anti-Christ.” He has called Buddhism and Shintoism “satanically inspired.”
- Cornerstone programs allegedly devoted to discussions of Judaism essentially promote “Jews for Jesus.” University of Pittsburgh Professor Mark Ginsberg has found Cornerstone's programming to be “extremely offensive to someone like myself who was raised a Jew.”
- Cornerstone's “flagship” program, *Getting Together*, refers to Hinduism as “the Kingdom of the enemy.”
- Monsignor Charles Owen Rice of the Pittsburgh Catholic Archdiocese has noted Cornerstone program promotions that were “hostile to Catholics.”

Commissioner Gloria Tristani in her dissent: “In a religiously diverse society, sectarian religious programming, by its very nature, does not serve the ‘entire community’ and is not ‘educational’ to non-adherents.”

Much of what passes for religion on Cornerstone is, in fact, politically partisan speeches on issues of the day. Other targets on Cornerstone broadcasts include organized labor, public school teachers, environmentalists, gays and lesbians and other minorities. For example, here is a statement by Reverend John Hagee of Cornerstone Church in San Antonio: “A moral sewer is taking the nation under. We need righteous men to go to government or the godless, immoral, the tree hugging neo-pagans, the radical lesbian homosexuals will still rule Washington, D.C.”

On James Kennedy's *Coral Ridge Ministries Hour* we are taught that the major teacher's unions seek to “destroy this nation.” Their teachers are said to be “deliberately deceitful” in stripping children “of any sense of moral or ethical absolutes.” On *Crisis in the Classroom*, produced by the Eagle Forum and narrated by Phyllis Schlafly, discipline breakdown and lower test scores are blamed on a concerted plan by ideologically minded educators to inculcate “socialism.”

In the program, *Behind the Green Curtain*, viewers are warned that environmentalism is a conspiracy of rich elites to curtail property rights, acquire public land, and exert control over people. The real agenda of the environmentalists, the narrator advises, is “transferring power to the U.N. to bring about one-world government.”

Even ostensibly secular discussions of public policy are biased by Cornerstone's ultraconservative religious-political mission. For example, the host of *Focus on the Issues*, Jerry Bowyer, is head of the conservative libertarian think tank the Allegheny Institute for Public Policy, funded by Richard Mellon Scaife. Bowyer also sits on the board of directors of the Pennsylvania branch of the Christian Coalition, along with its head, Rick Schenker, the original host of the show. And Bowyer is a former leader of the National Reform Association, where he advocated making the United Nations into a theocracy with Jesus Christ written into its constitution.

SPPTV produced numerous Declarations from academics and clergy critical of Cornerstone programs. For example, Dr. Carol Stabile, University of Pittsburgh, watched Cornerstone's children's program, *Sunshine Factory*, and concluded that it "had no clear educational content or substance." Science writer Michael Schneider noted that Bixler's "creation science" program, *Origins*, "makes no effort to balance its narrow perspective." Likewise, Carnegie Mellon University Physics Professor Lincoln Wolfenstein cited "misinformation" and found that *Origins* had "no educational value and in fact [is] harmful to the public understanding of science."

We also charged that Cornerstone's programming violates the Commission's "fair break" doctrine, which refers to "the repeated making of irresponsible charges against any group or viewpoint without regard for the truth of such charges and without determining in advance of their publication whether they can be corroborated or proven."

University of Pittsburgh Public Health Professor Anthony Silvestre found the "portrayals of homosexual men and lesbians" on the *Coral Ridge Ministries Hour* to be full of "misinformation and cruel stereotyping." In his view, this creates "a hostile environment for young people and others who need counseling and education, and misleads non-homosexuals who may need accurate information."

The program *Exposing the Lie* condemns other branches of Christianity, including Unitarianism and the Church of the Latter Day Saints (Mormonism), calling the latter a "cult" and claiming the former promotes divorce, teenage pregnancy and venereal disease. Cornerstone's "flagship" program, *Getting Together*, refers to Hinduism as "the Kingdom of the enemy."

In an area in which 83 percent of church-goers are Catholic, Monsignor Charles Own Rice found at least one of the two programs identified by Cornerstone as "for Catholics" to be "not your normal Catholic fare." In fact, he noted ads for other Cornerstone programs that were "hostile to Catholics." University of Pittsburgh Professor Mark Ginsberg found Cornerstone's programming "extremely offensive to someone like myself who was raised a Jew."

In August 1996, Tom Green, producer and host of Cornerstone's popular music video program, *Lightmusic*, announced that he was quitting. Green explained, "Christian television's formula continues to be: find a bunch of old people who will give you their life savings and program not to offend them. I have seen the simple desire to serve God transformed into endless flow charts and cynical pandering to people's bases instincts."

Green had no appeal because the majority of Cornerstone's seven-member board of directors consisted of the owner and officers of the corporation, many of which were related to each other by blood or marriage. In short, the board seriously lacked the requirement that it be based in and representative of its community of service.

There are several points we wish to make with respect to the bill at hand:

- (1) Cornerstone's program schedule is not unique. Religiously owned broadcasting stations rely heavily on syndicated programs, including those cited above, for their broadcasting schedule.
- (2) In fact, most, if not all of these stations are in violation of provisions regarding locally originated programming to serve the local community.
- (3) Many of these stations are in violation of regulations concerning partisan political politicking, a standard especially critical regarding reserved educational licensees.
- (4) Many of these stations are in violation of the still standing "Fair Break" doctrine, which refers to "the repeated making of irresponsible charges against any group or viewpoint without regard for the truth of such charges and without determining in advance of their publication whether they can be corroborated or proven."

Proponents of this bill claim that a government agency should not have the right to regulate content by determining whether a program is educational or cultural in intent. Yet Congress has charged the FCC with authority and responsibility for "protecting the public interest, convenience and necessity." Moreover, the standards that apply to noncommercial licensees are necessarily higher because they are specifically reserved to provide programming that is "primarily educational" and in service of "the entire community."

Proponents claim that parsing the meaning of the bible is no different than parsing the meaning of a literary text like Shakespeare. This is sheer obscurantism. When literary scholars parse or deconstruct text allegedly written by Shakespeare it is for the purpose of particularizing its meaning in relation to its time and place and the biography of the author. When televangelists parse the meaning of the bible, they do so without parameters and seek to impose their interpretation as universally valid for all peoples at all times. This is not education, but demagoguery. Only one point of view is presented and no evidence is presented in support other than text selected by the orator.

However, the most important point has been totally neglected in this whole debate: This schedule of programs does not serve the entire community. We definitely are not calling for censorship. Much as we disagree with it, we accept the right of Cornerstone and other religious broadcasters to promote their views on commercials licenses, which they hold.

However, these educational licenses are reserved for the whole community. Even the most casual observation of the governance and program schedule of these stations reveals them to be narrowly based, religiously, politically and socially. They are not open to the participation of those who are different from them in the governance and programming of these stations. As such, they usurp a resource intended for broader community service for their own narrow and partisan interests. They are not the victims, but the predators.

Coalition to Defend Educational Television—Action Alert

Two bills working their way through Congress pose a direct threat to educational broadcasting. For half a century Congress has reserved a portion of the broadcast spectrum to be used for the purpose of providing "primarily educational" programming to the "entire community."

The integrity of these channel reservations now is being challenged under the disingenuous cover of "religious freedom." Since the Reagan Administration's deregulation of Federal Communication Commission (FCC) standards, Christian radio stations have more than doubled to 1,648 and Christian television stations more than tripled to 350.

According to a report in *Current*, the public broadcasting trade paper, many of these stations have abused regulations regarding commercialism, localism, community representation, fairness and partisan politicking. In recent years, Christian broadcasters have come to occupy 400 noncommercial educational (NCE) radio channels and 15 NCE TV channels. This is just the tip of the iceberg. Christian broadcasters are, by far, the most active applicants for NCE channels that are or may come open.

The FCC is empowered by law to regulate broadcast license holders and applicants on a case-by-case basis. Sometimes, this requires an interpretation, even elaboration, of existing guidelines. Recently, Senate Commerce Committee Chair John McCain made national headlines when he pressured the FCC to approve license applications in Pittsburgh benefiting one of his major contributors, Lowell Paxson, owner of the Pax TV network. That deal also required the transfer of the license for WQEX, a popular public television station, to Cornerstone TeleVision. The proposed deal provoked enormous community opposition. Up to 40,000 letters and calls were sent to protest the loss of an educational station to a self-described "religious ministry" that routinely featured attacks on other religions, public school teachers, environmentalists, gays and lesbians and others.

By a narrow 3-2 majority, the commissioners approved the applications, partly on the basis of promises by Cornerstone to broaden its board and program schedule. Confronted with program guidelines too vague to be meaningful, the commission also voted 3-2 to provide "additional guidance" for NCE license holders and applicants.

The new guidelines stipulated that "primarily educational" meant that at least half of a station's program schedule must consist of programs that are primarily educational. Moreover, extortion, preaching, and proselytizing, while permitted, could not count toward the educational requirement.

These apparently modest and reasonable new guidelines unleashed a torrent of protest from the National Religious Broadcasters (a self-described "Association of Christian Communicators"), Paxson Communications and their allies in Congress.

Angry letters from powerful politicians and resolutions in both houses of Congress intimidated Commissioners William Kennard and Susan Ness into rescinding their own language while letting stand the license transfer approvals even before all interested parties had filed their own Petitions to Reconsider. In the aftermath of this easy victory, both Rep. Mike Oxley (R-OH) and Sen. Sam Brownback (R-KS) have vowed to move their bills through Congress to "also ensure that the precepts underlying the Additional Guidance do not otherwise influence the FCC application approval process."

In short, they seek to deprive the FCC of its regulatory power to protect the public interest in channel assignments, essentially removing all eligibility requirements for noncommercial educational licenses.

The first amendment does not guarantee broadcasters the right to a reserved channel and protecting the integrity of educational channels does not constitute discrimination against religious broadcasters.

This is a dangerous assault on channels that are essential to the democratic process by a powerful lobby in the Republican Party seeking to promote its sectarian interests. It must not stand.



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Jerold M. Starr
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FOR IMMEDIATE RELEASE
Tuesday, February 16, 2000

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Coalition Defends Educational TV From Right-Wing Takeover

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Empowerment Project

Washington – A broad coalition of national educational and religious organizations are urging their members to write to Congress to fight a growing takeover of reserved educational licenses by ultraconservative religious broadcasters under the guise of religious freedom. Members are urged to tell their representatives to oppose House Resolution 3525, known as the "Religious Broadcasting Freedom Act" and Senate Bill S.2010.

The still growing coalition includes educational groups like the National Education Association, Center for Media Education, People for the American Way, Benton Foundation, Political Research Associates and National Writers Union and religious groups like the National Council of Churches, the Interfaith Alliance and Unitarian Universalists.

Coalition coordinator Jerry Starr, Executive Director of Citizens for Independent Public Broadcasting, observes, "Already having easily intimidated the Federal Communications Commission (FCC) into rescinding guidelines intended to protect educational licenses from partisan abuse, the religious right and their political allies now seek to deprive the FCC of all discretion to properly defend any eligibility requirements for noncommercial educational (NCE) television licenses."

Attorney John Crigler has notified the FCC that this is part of a growing takeover of NCE broadcasting licenses by the religious right. In the absence of any regulation, such groups have flooded the FCC with applications for NCE licenses, effectively barring community organizations with a genuine educational purpose. Donald Wildmon's American Family Association alone holds 165 NCE radio licenses and has 178 pending full-service applications.

Cutting through the rhetoric and reminding the FCC of its legislative responsibility, Diane Shust, Manager of Federal Relations at the National Education Association, has proposed that meaningful eligibility requirements for reserved educational licenses "is not discrimination against religion, but a defense of education. It is not unwarranted federal intrusion, but the FCC doing its duty to protect the public interest, convenience, and necessity."

Randy Naylor, Director of Communications for the 53 million-member National Council of Churches (NCC) agrees, "Protecting the integrity of a noncommercial and public channel does not constitute discrimination against religious broadcasters." In the view of the NCC, these channels "should provide a diversity of truly educational programs for all significant constituencies in the community."

"This is not discrimination against religion, but a defense of education. It is not unwarranted federal intrusion, but the FCC doing its duty to protect the public interest, convenience, and necessity," said Diane Shust, Manager of Federal Relations at the National Education Association.

Ralph G. Neas, President of People For the American Way Foundation, observed, "It is clear that some religious broadcasters are not willing to be bound by standards that apply to all noncommercial, educational licensees. They are asking for special privileges and claiming that the failure to grant them is discrimination. Congress and the FCC should resist right-wing pressure on this issue."

Religious broadcasters have called for letters to the FCC and Congress urging them to reverse the ruling. Four Republican Congressmen, led by Rep. Michael Oxley (R-OH), sent a letter to FCC Chairman Kennard and Vice President Gore threatening to have the decision overturned "legislatively or in court." On Monday, January 24 they will introduce a resolution in the House to overturn the decision.

The Rev. Barry W. Lynn, Executive Director, Americans United for Separation of Church and State, responds, "The FCC is attempting to apply fair and reasonable guidelines to ensure that educational TV stations are truly educational and not extensions of somebody's religious ministry. We think the FCC is on the right track and should not cave in to pressure from powerful religious broadcasters and their political allies."

In addition to the above organizations, the still growing coalition of educational and public interest groups already includes the Benton Foundation, Center for Media Education, National Writers Union, Political Research Associates and others. They are asking the FCC not only to stand by existing eligibility requirements, but to provide more concrete guidelines for community groups to use in determining whether local broadcasters are meeting their educational obligations under the law.

Letters to the FCC can be sent through Citizens for Independent Public Broadcasting, at their web site, www.cipbonline.org.

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FOR IMMEDIATE RELEASE
THURSDAY, JANUARY 20, 2000

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**COALITION OPPOSES RELIGIOUS RIGHT ASSAULT
ON EDUCATIONAL TV STANDARDS**

Washington, DC—A growing coalition of educational and public interest organizations are urging their members to write to the Federal Communications Commission (FCC) to fight an attempt to roll-back eligibility requirements for noncommercial, educational television licenses. The roll-back is being led by Paxson Communications, the National Religious Broadcasters, and Donald Wildmon's American Family Association.

"We are dedicated to preserving all educational licenses for their legislated purpose. They should provide a diversity of truly educational programs for all significant constituencies in the community," said Jerry Starr, Executive Director of Citizens for Independent Public Broadcasting.

This case first came to national attention earlier this month with the front-page story of Sen. John McCain's demand that the FCC approve a three-way TV license exchange in Pittsburgh by December 15. On December 14, 1999, the FCC announced that it had voted 3-2 to approve the applications. Investigation by the press revealed that McCain had acted on behalf of Lowell "Bud" Paxson of Paxson Communications, a major contributor to McCain's campaign.

All attention was focused on whether McCain's intervention was improper. Little notice was paid to the highly unusual deal which transferred the license for Pittsburgh's popular public television station, WQEX, to the commercially-run conservative religious station Cornerstone TeleVision. The applications were stalled for two-and-a-half years due to enormous community opposition—including 40,000 calls, letters and petition signatures. Residents did not want to lose WQEX and also were offended by Cornerstone's frequent attacks on other religions, environmentalists, public school teachers, gays and lesbians, and others.

In the same decision, by a 3-2 vote, the commissioners reaffirmed and clarified eligibility requirements for noncommercial, educational television licenses. Namely, more than half of the station's broadcast schedule must consist of programs that are primarily educational, cultural or instructional in purpose. Church services, preaching, proselytizing or personal statements of belief would not count toward meeting the educational programming requirement.

Concerned about these guidelines, Cornerstone informed the FCC on Wednesday, January 19, that it was terminating all agreements and would not consummate any of the transactions. Earlier, Eagle had said to the press, "We have a mission" to "bring Glory to his name" and "we can't jeopardize it." Paxson Communications, the National Religious Broadcasters, and the American Family Association have protested the clarified guidelines, claiming discrimination against religious broadcasters and unwarranted federal intrusion.

(Continued on page 2)

Rob Cavanaugh, Legislative Director, Unitarian Universalist Association of Congregations adds, "The issue here is not government hostility towards religion, but weighing the needs of the whole community against the wants of a strident religious minority." Ralph G. Neas, President of People for the American Way, has accused religious broadcasters of "asking for special privileges and claiming that failure to grant them is discrimination."

Starr points out that, under the guise of "religious freedom," many of these broadcasters pass off hate mongering as educational. In the Pittsburgh license transfer case that sparked the new guidelines and the reaction, local clergy and academics documented for the FCC Cornerstone TeleVision attacks against Catholics, Jews (e.g. leaders of an international conspiracy of bankers and intellectuals to create a "New World Order"), Hindus ("the Kingdom of the enemy"), Unitarians (promoters of "divorce, teenage pregnancy and venereal disease"), Mormons ("a cult"), and even Methodists, Baptists, Episcopalians, Lutherans, and Congregationalists who are alleged to be "not really Christian" unless they are "born again."

Members of the coalition are asked to place action alerts on their web sites and to link with Citizens for Independent Public Broadcasting so that members might receive direction on how to write to their representatives in Congress on this matter. "Beyond that," Starr says, "we plan to call for a rulemaking to revisit this question of eligibility requirements for reserved education frequencies and how the public interest might best be served." He adds, "Perhaps in a non-election year, we might have a less hysterical climate in which to reflect on the true meaning of education and religious freedom as they apply to broadcasting."

Background

The two resolutions follow an FCC decision on the Pittsburgh license transfer applications that exposed Senator John McCain's influence peddling on behalf of media mogul Lowell "Bud" Paxson. The highly controversial deal proposed to transfer the license for Pittsburgh's popular second public television station, WQEX, to televangelist station, Cornerstone TeleVision, so that Paxson could take over Cornerstone's old license for his Pax TV network.

The Save Pittsburgh Public Television campaign generated tens of thousands of letters and phone calls, plus organizational resolutions representing hundreds of thousands more in opposition to the deal because residents did not want to lose WQEX and were offended by its proposed replacement which a group of Pittsburgh academics and clergy charged offered bible thumping hate mongering as educational programming.

Under pressure by McCain, the commissioners narrowly approved (3-2 vote) the sale/swap conditional on Cornerstone's promises to broaden its governance and programming. However, by the same margin, the commissioners voted to interpret the guidelines that educational frequencies provide programming that is "primarily educational" and "responsive to the overall public" as meaning that at least half the station's schedule must consist of programs that are "primarily educational in purpose." Moreover, "programming primarily devoted to religious exhortation (e.g. preaching), proselytizing or personal statements of belief [while permitted], generally will not qualify as educational programming."

Within days, a torrent of protest from members of the National Religious Broadcasters (NRB), a self-described "Association of Christian Communicators," Paxson Communications, and their conservative Republican allies, intimidated the FCC into rescinding its own guidelines. Several reporters also have

cited pressure from Presidential candidate Al Gore who is running as a "born again" Christian against Bill Bradley and did not want to have to defend the additional guidance during the campaign.

In her dissent, commissioner Gloria Tristani deplored her colleagues' capitulation to "an organized campaign of distortion and demagoguery." Tristani stated, "In a religiously diverse society, sectarian religious programming, by its very nature, does not serve the 'entire community' and is not 'educational' to non-adherents."

A spokesperson for the NRB boasted about winning the "battle," but vowed to continue the "war." In mid-February, FCC Mass Media Bureau Chief Roy Stewart appeared at the NRB's annual meeting to assure them that the commission is going back to relying "on the good-faith judgment of religious broadcasters that the programming serve an educational purpose." Nevertheless, Oxley and Brownback have vowed to leave their resolutions in Congress to make certain that the FCC does not regulate religious broadcasters too closely in the future.

Before the FCC's sudden retreat, the Rev. Barry W. Lynn, Executive Director, Americans United for the Separation of Church and State, had commended the new guidelines as a "fair and reasonable" attempt "to ensure that educational TV stations are truly educational and not extensions of somebody's religious ministry." He urged the FCC "not to cave in to pressure from powerful religious broadcasters and their political allies." In the aftermath, Lynn has reaffirmed his organization's commitment to protecting the integrity of educational broadcasting license assignments.

BACKGROUND

Is this what Rep. Mike Oxley, author of "The Religious Broadcasting Freedom Act," means by religious freedom?

A Sampling of Cornerstone TeleVision Comments on Other Religions:

- In Bob Anderson's *Exposing the Lie* we are told that unless you're born again, you aren't really Christian: "It doesn't matter what the name is on the door...whether it's Methodist, Baptist, or Episcopalian or Lutheran or Congregational...that doesn't make a person a Christian." According to Anderson, Unitarianism is a "cult" and Church of the Latter Day Saints (Mormons) "promotes divorce, teenage pregnancy and venereal disease."
- Pat Robertson's New World Order thesis holds that most wars and other horrors have been caused by Jewish international bankers and a secret religious society called the Illuminati. The (Jewish) Anti-Defamation League has denounced Robertson's book as anti-Jewish "kookery" that should be a national issue. Cornerstone has repeated programs featuring this theme in *The Money Masters* and *Global Bondage*.
- Cornerstone regularly airs the *700 Club*, where host Pat Robertson refers to other faiths—like Episcopalians, Presbyterians and Methodists—as having "the spirit of the anti-Christ" and Robertson calls Buddhism and Shintoism "satanically inspired."
- Cornerstone programs allegedly devoted to discussions of Judaism essentially promote "Jews for Jesus." University of Pittsburgh Professor Mark Ginsberg has found Cornerstone's programming to be "extremely offensive to someone like myself who was raised a Jew."
- Cornerstone's "flagship" program, *Getting Together*, refers to Hinduism as "the Kingdom of the enemy."
- Monsignor Charles Owen Rice of the Pittsburgh Catholic Archdiocese has noted Cornerstone program promotions that were "hostile to Catholics."

Commissioner Gloria Tristani in her dissent: "In a religiously diverse society, sectarian religious programming, by its very nature, does not serve the 'entire community' and is not 'educational' to non-adherents."

Timetable of Events

December 14, 1999: Under extreme pressure from Senate Commerce Committee Chair John McCain, the FCC announces that it has approved Pittsburgh license transfer applications pending since July 1997. McCain's influence peddling is revealed to be on behalf of Lowell Paxson seeking an outlet for his Pax TV network in Pittsburgh.

McCain charges the FCC with being a slow moving bureaucracy, but the delay is due largely to enormous community opposition to the deal, which also transfers the license for popular public TV station WQEX to Cornerstone TeleVision, an ultraconservative religious ministry that routinely preaches bigotry against other religions, environmentalists, public school teachers, gays and lesbians and others.

December 30, 1999: The FCC releases the text of its decision in the Pittsburgh case. The vote is 3-2 to approve the applications, based in part on Cornerstone's promises to broaden its board and programming in the future. Commissioners William Kennard and Gloria Tristani dissent, stating "there are simply too many unresolved questions of fact regarding whether the proposed programming is primarily educational or primarily something else." They argue that "to preserve the integrity of channels reserved for educational use," the applicant should not be given "a free pass."

Commissioner Susan Ness, a Democrat, joins the two Republicans, Harold Furchtgott-Roth and Michael Powell, in approving the applications. However, Ness also joins Kennard and Tristani in approving a "clarification" of guidelines for educational channels. Kennard and Tristani argue that "standing alone, the majority's decision to grant this application would eliminate all eligibility standards for the reserved band." Ness adds that commissioners "have an obligation to provide additional guidance to FCC staff, as well as to applicants and existing licensees, if we are able to assess whether a broadcaster's judgment is reasonable." The new guidelines appear to respond to the numerous declarations submitted by Pittsburgh clergy and educators evaluating Cornerstone programming.

The additional guidance interprets the requirement that educational frequencies provide programming that is "primarily educational" and serves "the entire community" as meaning that at least half of the total schedule must consist of programs that are themselves primarily educational. Moreover, "programming primarily devoted to religious exhortation (e.g. preaching), proselytizing, or statements of personally held religious views and beliefs [while permitted] generally will not qualify as educational programming." The two Republican commissioners dissent, claiming the clarified guidelines could "open a Pandora's box of problems."

January 4, 2000: A spokesperson for the National Religious Broadcasters (NRB), a self-described "Association of Christian Communicators," announces that his group considers the guidelines a "dangerous precedent for religious broadcasters." Conservative newswires promote the misinformation that "more than 125 noncommercial television broadcasters may be forced to drop religious programming." The NRB's Kari Stoll opines, "I would think that religious services and exhortation would certainly serve the needs of the community."

January 6, 2000: At Paxson's urging, Republican Congressmen Michael Oxley, Steve Largent, Charles Pickering, Jr. and Cliff Stearns send a letter to Chairman Kennard (copied to Vice President Al Gore) stating: "We advise you to reverse this ruling, or stand by and see it overturned legislatively or in court." Kennard responds January 12, pointing out that the FCC granted the applications, the noncommercial educational (NCE) standards only apply when NCE certification is requested, and never prohibit particular programming from being aired based on its religious nature.

January 13, 2000: Five Republican Senators (Enzi, Helms, Hutchinson, Inhofe and Nickles) write to Kennard accusing the FCC of suppressing "religious speech on the basis that it may not be 'educational' or 'cultural.'" They call for a withdrawal of the additional guidelines.

January 19, 2000: Cornerstone withdraws its application. Cornerstone President Oleen Eagle explains, Cornerstone "is called by God to serve and excel as a media ministry to bring glory to his name" and we can't jeopardize that. Eagle adds, "We went into the whole thing because 15 or 20 full-power stations in the U.S. were already operating on reserved channels and they had the same type of programming we had." Indeed, religious broadcasters have hundreds of applications pending for reserved, noncommercial, educational channels. A major player is Donald Wildmon's American Family Association, previously known for its boycotts of commercial television.

January 20, 2000: House Telecommunications Subcommittee Chair Billy Tauzin (R-LA) demands that each of the five commissioners submit answers in writing to 32 questions concerning the decision by no later than February 4, 2000.

Also on January 20, the Coalition to Defend Educational TV issues a press release not only supporting the new guidelines but asking the Commission for even more concrete standards so that communities can determine whether local broadcasters are, in fact, meeting their educational obligations under the law. At this point, the Coalition includes the National Education Association (NEA), People for the American Way (PFAW), Americans United for the Separation of Church and State, Benton Foundation, Center for Media Education, National Writers Union, and Political Research Associates.

The NEA's Diane Shust comments, "This is not discrimination against religion, but a defense of education. It is not unwarranted federal intrusion, but the FCC doing its duty to protect the public interest, convenience and necessity." PFAW President Ralph Nease accuses "some religious broadcasters" of "asking for special privileges" and urges Congress and the FCC to "resist right-wing pressure on this issue." Rev. Barry W. Lynn of Americans United for the Separation of Church and State responds, "The FCC is attempting to apply fair and reasonable guidelines to ensure that educational TV licenses are truly educational and not extensions of somebody's religious ministry." He urges the FCC not to "cave in to pressure from powerful broadcasters and their political allies."

January 24, 2000: Rep. Oxley and 42 co-sponsors introduce the "Religious Broadcasters Freedom Act," calling for the additional guidelines to be overturned unless and until an FCC rulemaking is conducted to consider such.

January 28, 2000: All interested parties submit Petitions to Reconsider to the FCC. The NRB and Paxson Communications protest the FCC's decision to "issue new rules in the Pittsburgh Decision, rather than following the notice and comment rulemaking procedures." The Save Pittsburgh Public Television campaign protests the extensively documented violations of restricted proceeding and undue political influence brought to bear on the decision to approve the license transfers.

Rather than defend their original decision, wait to reconsider all petitions, or even call for an open rulemaking, Commissioners Kennard and Ness suddenly join the two Republicans in rescinding the paragraphs spelling out the additional guidelines. At the same time, they let stand the original approval of the transfer applications and do not acknowledge Cornerstone's request for withdrawal.

Kennard and Ness express regret that their actions "have created less certainty rather than more, contrary to [their] intentions." In contradistinction, Commissioner Furchtgott-Roth comments, "It was not for lack of clarity that [critics] objected to the decision but for infringement of freedom of speech and religion--and rightly so."

Commissioner Tristani calls it "a sad and shameful day for the FCC. In vacating last month's 'additional guidance on its own motion' without even waiting for reconsideration petitions to be filed, this supposedly independent agency has capitulated to an organized campaign of distortion and demagoguery."

Also on January 28, the Save Pittsburgh Public Television campaign files its own Petition for Reconsideration. Represented by the Georgetown University Law Center, the petition charges that the FCC's rescinding of the new guidelines is the result of improper presentations and pressures exerted by powerful politicians on behalf of Paxson Communications. As such, the Commission should investigate these violations of restricted proceedings and reconsider its decision to approve the applications.

February 1, 2000: Lowell Paxson and the NRB celebrate the FCC's precipitous turn around. However, Rep. Oxley vows to continue moving his bill along. Sen. Brownback (R-Kan.) introduces a companion bill. Broadcasters demand that the Commission "must also ensure that the precepts underlying the Additional Guidance do not otherwise influence the FCC application approval process." Cornerstone says that, before considering reentering the deal, it would need "strong assurance from the FCC that religious programmers would not be subject to scrutiny or our license would not be subject to any level of peril."

February 8, 2000: "It was a total victory on this issue," declares NRB President Brandt Gustavson, "but it was only a battle. The war continues." In short, having tasted an easy victory, the religious right seeks a total rollback of all eligibility requirements for noncommercial educational licenses.

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IF YOU HAVE RECEIVED THIS FAX BY MISTAKE OR WOULD LIKE TO BE REMOVED FROM THIS LIST, PLEASE CALL 1-877-461-2456.

